

No. 14,915

IN THE

United States Court of Appeals
For the Ninth Circuit

LORENCE ALICE PAQUET,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

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*Attorney for Appellant
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*the Court as constituted in the original hearing
of the above entitled appeal, namely: Honorable
William Denman, Chief Judge; Honorable Rich-
ard H. Chambers, Circuit Judge; and Honorable
Ernest A. Tolin, District Judge:*

Comes now Florence Alice Paquet, appellant above
named, and presents this, her petition for a rehearing
of the above entitled matter, judgment in which
matter was filed July 10, 1956, on the following
grounds:

From a careful reading of the opinion, it appears to appellant that admittedly the two duplicate original copies of appellant's application for a passport, Exhibits 2 and 3, did not meet the requirements of F.R.C.P. 44(a), and would be admissible only if proved by some other method authorized by another equally applicable statute or by the rules of evidence at common law, citing F.R.C.P. 44(c); but in the circumstances of this case, the statutes referred to by the Court—28 U.S.C. sec. 1733(b) and 5 U.S.C. sec. 22—are not "applicable statutes". Section 1733(b) applies only to "properly authenticated copies". The authentication here can only be proper if it comes within the terms of Section 22, but Section 22 does not provide for authentication either directly or by inference. It is limited to certain specified areas in which regulations may be prescribed, which limitations can best be described as intermural activities.

Proof of documents by producing certified copies thereof was unknown to the common law. Indeed, as pointed out by writers on the subject, it was because of "the intolerable inconvenience" of the "necessary production of the original of a document", under the common law that the rule was relaxed by statutory enactment.

After pointing out that under the common law records and ancient deeds of thirty years' standing prove themselves, Mr. Blackstone states that at common law the rules of evidence as to "modern deeds

and other writings" are to be proved by evidence
witnesses. *Jones' Blackstone* (1916) §485(bb).

Dated, Honolulu, Hawaii,
July 31, 1956.

Respectfully submitted,

FLORENCE ALICE PAQUET,

Appellant and Petitioner,

By O. P. SOARES,

Her Attorney.

CERTIFICATE OF COUNSEL.

I, O. P. Soares, attorney for appellant and petitioner above named, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated, Honolulu, Hawaii,
August 1, 1956.

O. P. SOARES,
*Attorney for Appellant
and Petitioner.*

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No. 14,916

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Appellant was convicted on four counts of an indictment, each count charging a violation of Title 18 U.S.C. Sec. 1341, attempt to evade the payment of income taxes. (R. 3.)¹

Count 1. Charged the filing of a false and fraudulent personal income tax return for the calendar year of 1945. (R. 3.)

Count 2. Charged the filing of a false and fraudulent income tax return for the calendar year 1945, for his wife Bessie B. Olender. (R. 4.)

¹There had been a prior trial and conviction in this case and this court reversed the conviction. (*Olender v. United States*, 210 F. 795.)

Count 3. Charged the filing of a false and fraudulent personal income tax return for the calendar year 1946. (R. 5.)

Count 4. Charged the filing of a false and fraudulent income tax return for the calendar year 1946, for his wife Bessie B. Olender. (R. 6.)

The Court sentenced appellant to imprisonment for a period of 3 years, to pay a fine of \$20,000 and costs. (R. 9.)

From the foregoing judgments and sentences appellant prosecutes this appeal.

JURISDICTIONAL STATEMENTS.

1. *Jurisdiction of the District Court.* 18 U.S.C. Sec. 3231 provides that "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

2. *Jurisdiction of this Court upon appeal to review the judgment.* 28 U.S.C. Sec. 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 1294 provides in part that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

3. *The pleadings necessary to show the existence of jurisdiction* are the indictment (R. 3) and the pleas of not guilty.

4. *Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this court has jurisdiction to review the judgments in question.* These facts are set forth in the introductory sentences to this brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

General nature of the case, the theory on which it was tried and the main and secondary issues involved.

The indictment charged appellant in four counts with the filing of false and fraudulent income tax returns for himself and wife, computed on a community property basis, for the calendar years 1945 and 1946. Counts 1 and 2 refer to the year 1945 while Counts 3 and 4 refer to the year 1946.

The Government relied on the "net worth method" of proof and had to establish with "reasonable certainty" appellant's net worth as of December 31, 1944, December 31, 1945 and December 31, 1946. (*Holland v. United States*, 38 U.S. 121, 99 L. ed. 150.)

Prior to the final trial of this case the parties entered into a written stipulation as to the assets and liabilities of appellant and his wife at the close of the years 1944, 1945 and 1946. Prior to the second and present trial an amended stipulation was entered into. Both stipulations were introduced in evidence as U.S. Exhibits 11 and 11a (R. 129.)

These stipulations provided that neither party was precluded from offering evidence of any character bearing on or related to wilfulness or lack of wilfulness, or evidence relating to items of assets, liabilities or expenditures of appellant or his wife not included in the stipulations; that each party shall have the right to offer evidence as to the ownership or source of the funds with which U.S. Bonds were purchased and that the stipulations should not be construed as shifting the burden of proof to defendant or relieving the prosecution from proving the charges in the manner provided by law.

The computations of the Government were incorporated in a series of tables admitted in evidence as U.S. Exhibit No. 50. (R. 412.) These computations are set forth in the Appendix at page i. With certain exceptions the Government's computations as to assets are based on the foregoing stipulations.²

The stipulations reserved to each party the right to introduce evidence as to further assets or liabilities and as to the ownership of any such assets or liabilities in the possession of appellant or his wife during the years involved.

The main issue involved is whether the prosecution established to a reasonable certainty the opening and closing net worth of appellant. Included in this issue are:

²The items of assets in the computations not included in the stipulations are: In 1944, the sum of \$50,000 cash in safe deposit; in 1945, cashier's check for \$7724, \$7200 cash in safe deposit, \$125.49 paid to George Belling; in 1946, \$10,000 for stock in and as a loan to Asturias Corporation, and \$4335.04 expenditures to various shops.

(a) The amount of cash appellant had in his safe deposit boxes at the close of the years 1944, 1945 and 1946.

(b) Whether among the bonds in the possession of appellant at the end of 1945, \$20,000 thereof were the property of and purchased by appellant's mother.

(c) Whether appellant was entitled to be credited with an additional \$20,550 at the end of 1944 as the value of certain so-called Goodman sailor suits either on hand at that time or the proceeds of the sale thereof.³

(d) Whether the sum of \$7724 should have been included as an asset of appellant at the end of 1945.

GOVERNMENT'S CASE IN CHIEF.

The Government first offered in evidence the income tax returns involved in the indictment as U.S. Exhibits 1, 2, and 4. (R. 41-43.)

MEDBURY BLANCHARD, called by the Government, testified in substance as follows:

During 1947 I was a special agent of the Bureau of Internal Revenue. (R. 45.) In July of 1947 I interviewed Mr. Olender at his place of business in the Army and Navy store in Oakland. (R. 46.) He said he had done some business with the George Goodman Agency but he didn't know how much. (R. 47.) He told me that he had

³The judge instructed the jury that these 3 items were, in his opinion, of critical importance (R. 928), and this Court so held in the prior appeal. (210 F. 2d 795.)

some experience in making out income tax returns and that he had made them out for his family and friends. Olender said he attended the University of California and had studied accounting there. (R. 50.)

Some days later I again saw him and asked him if he had gotten the records of his purchases from the Goodman Sales Co. He said he had and showed me a check and an invoice. It was one of his cancelled checks drawn to the George Goodman Sales Co. for sailor suits. I don't know where the check and invoice are now. (R. 51.) Olender said he had been trying to get merchandise from the East and that he had sent money back there but this was the only transaction he showed me as having apparently been completed. The check was for \$1380. (R. 52.) I then investigated the records of the Bank of America in Oakland and came across some cashier's checks payable to the Goodman Sales Co. (R. 52.) The applications upon which those checks had been issued were signed with the name Milton Olender. (R. 53.)

(6 cashier's checks issued by the Bank of America were admitted in evidence as U.S. Exhibit No. 6 (R. 55); 3 checks dated January 10, 1944 payable to George Goodman for \$2250 each; 2 checks dated January 22, 1944 payable to George Goodman for \$2250 each and 2 checks dated January 22, 1944 payable to George Goodman for \$2350 each.)

After receiving those checks I had a conversation with Mr. Olender following which he appeared at the Intelligence Unit Office. (R. 56.) I questioned Olender and the questions and answers were transcribed. (R. 56.) The paper you show me I believe is the statement I took at

at time. Some time later I showed the transcribed statement to Mr. Olender. (R. 57.) I asked Olender to read the statement and see if it was true. He made various comments about it and made some suggestions for changing . The paper you now show me is a carbon copy of the statement. (R. 58.) The interlineations in pencil and pen and certain pieces which have been pasted on the carbon copy containing additional typewriting information were done by the stenographer and in some instances by me after conversing with Olender about them. (R. 59.) Where a change appears on the carbon copy the information was provided by Olender. I cannot state exactly the words Mr. Olender used; that is impossible. I don't recall whether I made any changes on that document out of Olender's presence. (R. 59.) The information in the changes came from Olender and was handed over by me to the stenographer. Olender didn't come in for the revised copy at all. As all this was merely part of another investigation I turned the matter over to another special agent and made no attempt to have this signed. (R. 60.) I never asked Olender to sign the statement. (R. 60.)

(The original and carbon copy of the statements were admitted in evidence as U. S. Exhibits 7 and 8 over the objection of appellant that no proper foundation had been laid for them; that they were never signed; that they were not accurate and that some changes had been made by someone on their face.) (R. 61.)⁴

The document you show me is the invoice of the Goodman Sales Agency with reference to the \$1380 check and

⁴The original and carbon copy of these statements were read into evidence at page 83. An inspection of the Exhibits is necessary to fully understand the objection.

is referred to in his statement. (U.S. Exhibit No. 9.) (R. 64.)

Cross-Examination. When I first saw Olender in 1947 he told me he thought he had done some business with the George Goodman Sales Agency of New York and said he would get me any records of those transactions that he had. (R. 66.) Some days after the first meeting Olender said he had found this one transaction with the George Goodman Co. and he showed me the check and I believe the invoice. (R. 68.) He said that was the only transaction with the Goodman Agency that he could find (R. 69), that this was the only transaction he was able to complete with the George Goodman Sales Agency. He might have said this is the only transaction I was able to complete directly with the George Goodman Sales Agency. (R. 70.)

I couldn't say that the statement of July 14, 1947 contains all the questions that were asked of and replies given by Olender. (R. 72.) I don't recall how long after taking the statement that it was transcribed. After the statement was transcribed Olender came back to the office and read the statement over. He said there were some corrections he wanted to make as there were errors in it. (R. 73.) Olender indicated the changes he wanted made and I discussed them with him and I wrote on the carbon copy what he said. (R. 74.) After the corrections were indicated by Olender the document was never retyped and was never again submitted to Mr. Olender. (R. 74.) As to the corrections on the carbon copy I believe Olender made some of them himself and some were made after he left. I can't say which corrections were made after he left. (R. 75.)

SETH L. ROOT, called by the Government, testified in substance as follows:

Direct Examination. I am an Internal Revenue Agent. (R. 93.) I first met with Olender on December 29, 1947 in our conference room in Oakland. No one else was present. (R. 93.) Olender stated he had prepared both his and his wife's returns for 1944, 1945 and 1946. (R. 94.) In the returns for these years there appeared an item of separate income. Olender explained that his father and his uncle had been partners in certain rental property and businesses located in Fresno; that the uncle had died some time in the 1930's and that the uncle's children had come into the uncle's portion; that Mr. Olender's father passed away in 1940 and this property had been devised to Mr. Olender under the terms of his father's Will; that this property formed the basis of the separate income reported. (R. 95.)

He stated the Army and Navy store was community property and described its business. (R. 96.) U.S. Exhibit shows U.S. Bond interest of \$575.60. (R. 99.) The return for 1946 shows Bond interest of \$1720.17. Bond interests were reported as community property. (R. 100.)

We arranged for a subsequent meeting for January 12, 1948 on which date I went to his store. (R. 102.) Olender presented me with the books and records of the Army and Navy store and for two or three days I was engaged in making my audit and examining the books. On January 13th Olender stated to me that I was probably making my audit as a result of Blanchard's report on certain treasury currency reports. (R. 103.) I told Olender that since Blanchard had seen him, that Blanchard had made

checks of the Express Company's records which reflected the receipt of merchandise shipped by George Goodman in January and February of 1944 and I asked him for an explanation of the Goodman transaction. He stated that he was unable to recall it. (R. 104.) I didn't find any record in Olender's books of the Goodman transactions. (R. 104.)

I spent approximately a week at Olender's examining his books and in the latter part of the week I told Olender I would like him to submit to me a comparative net worth statement, year by year from January 1, 1942 to December 31, 1947. I explained to him briefly that it should be a list of all his assets and liabilities. (R. 107.) Shortly thereafter Charles Ringo called me and said that his firm had been engaged to prepare the net worth statement and subsequently Mr. Olender brought the net worth statement to my office. Olender swore to the net worth statement in the presence of Internal Revenue Agent Cropsey. (Net Worth Statement marked U.S. Exhibit No. 10.) (R. 110.)

Cross-Examination. When the treasury currency reports came into my hands they were not accompanied by any explanation of the taxpayer. (R. 112.) I knew there was a Mr. Reed who was head of the Special Intelligence Unit. I had no information that as early as 1946 Mr. Reed had made some enquiries of Mr. Olender relating to these T.C.R. reports. I have since seen some correspondence to that effect. (R. 113.)

Olender's books and tax returns were in numerical agreement with each other. (R. 114.) The books I examined of the Army and Navy store would not customarily

cord personal income from dividends or such. A man's personal investments and things are kept separate and apart from the records of his merchandising business. (R. 117.)

When Olender said he couldn't recall the circumstances of the Goodman transaction he had already been shown the checks drawn to George Goodman and the applications for those cashier's checks (R. 121) and he had already identified his signatures on the applications for the checks. On all the checks payable to George Goodman they bear the endorsement "George Goodman" and below that "Pay to the order of Lafayette National Bank, Seaford Uniform Corporation". (R. 121.)

Re-direct Examination. I saw a record of the bonds from Mr. Ringo. I never examined the bonds. At the bank I saw the treasury currency report referring to cash which was either used to purchase bonds or to purchase a cashier's check which I determined through the bank's records was to purchase bonds. (R. 125.)

CHARLES R. RINGO, called by the Government, testified in substance as follows:

Direct Examination. I am a certified public accountant with the firm of D. A. Sargent & Co. (R. 143.) I first met Milton Olender on February 16, 1948. He told me the Government was investigating his income tax and they wanted me to make a net worth statement. (R. 144.) Prior to then I saw Mr. Root of the Internal Revenue Department who first told me what the Government wanted in the net worth statement. We were to make it up by years. I abandoned that idea because it was virtually impossible to work it

out by years. Mr. Root wanted us to give a net worth statement beginning with the end of 1943 to the end of 1945 at the end of each year. (R. 146.) I never completed a yearly net worth statement. (R. 147.) To prepare the net worth statement I saw Olender's bank accounts and I had transcripts from the banks. Olender had large amounts of cash on hand and I asked him to bring me in an estimate which was purely an estimate of his net worth at the end of each year. Then I prepared questions to ask Olender and there were certain affidavits prepared by Mr. Monroe Friedman who at that time was Mr. Olender's attorney. (R. 147.) I looked over the books and records in the Army and Navy Store. (Here the books of account of the Army and Navy Store were marked U. S. Exhibits 12 to 16 for identification.) (R. 148.) Olender did not keep any record in the Army and Navy Store books of any activities other than those related to the Army and Navy Store business. (R. 149.) I couldn't find any purchases relative to the Goodman transaction in the books. (R. 152.) I talked to Olender on numerous times about the 1944 Goodman transactions. (R. 153.) Mr. Monroe Friedman was present at some of these talks. I was never given a complete explanation of the Goodman transaction. (R. 154.) I asked Olender about cashier's checks payable to George Goodman. He said he had so many transactions that he couldn't remember the particular transactions we were talking about. (R. 155.)

On May 5th we went to the safe deposit box and took an inventory of its contents. I asked Olender to bring me estimates of his net worth at the end of each year, which

he did. I summarized them and then prepared a series of questions asking Mr. Olender to refresh his memory and see what we could get as to his net worth. (R. 157.) U. S. Exhibit No. 17 is Olender's estimates of his assets and liabilities arriving at his net worth for January 1, 1942. This is in his handwriting. Exhibit No. 18 for identification is the similar data for 1948. (R. 158.) I had a similar sheet for each of the years 1943, '44, '45, '46 and '47. I gave up the idea of trying to make a net worth by years. Exhibits 17 and 18 for identification received in evidence. (R. 149.)) On Exhibit 17 it shows personal cash in safe deposit box \$75,000 and an affidavit as to that amount was later prepared. Olender had a long story as to this \$75,000 and it was covered in the affidavit. (R. 160.) (Here witness testifies as to Olender's statements as to how he acquired the \$75,000.) (R. 160-162.) I brought people in to confirm what Olender said as to his father being wealthy and had the sums available. (R. 162.) Exhibit 18 states that at the beginning of 1948 the cash in the safe deposit box was zero. (R. 162.) Exhibit 19 for identification is a summary of the estimated figures that were given me for the years of Dec. 31, 1941, '42, '43, '44, '45 and '46 with certain pencil notations I have made in here. It is my summary of these sheets. (R. 163.) The information on Exhibit 19 was taken from the summaries furnished me by Olender in his own handwriting. (R. 164.) The figures on the document which I have listed under "Cash in vault" were the estimated figures given me by Olender. He told me those figures were the best of his recollection. In preparing the net worth statements eventually submitted to the Government I didn't use these figures in their entirety. (R. 165.)

(Exhibit 19 admitted in evidence and under the heading "Cash in vault" shows as follows (R. 166) :

December 31, 1941	\$75,000
December 31, 1942	75,000
December 31, 1943	69,000
December 31, 1944	50,000
December 31, 1945	7,200
December 31, 1946)

The document you show me is a photographic copy of the inventory I made of the contents of the safe deposit box on May 5, 1948. Safe deposit box 56, Bank of America, 12th & Broadway. (R. 169.) On the inventory I have the type of bond, the serial number of the bonds and the certificate number of the stock certificates. (R. 169.) I procured from the Bank of America the record that Olender had box 56 and box 44 which was in the name of Molly or Milton H. Olender and was opened August 18, 1944. (R. 170.) (Photostat of inventory admitted in evidence as U. S. Exhibit No. 20.) (R. 171.)

I found some Asturias Import-Export stock in the safe deposit box.

I made up a net worth statement as of December 31, 1941 and December 31, 1947. (R. 187.) U. S. Exhibit No. 10 is Olender's net worth statement that I prepared. I went over it with Olender. (R. 187.) I had originally worked up a net worth statement when Olender informed me of his payment of a single premium life insurance in the sum of \$15,833.46. The effect of this figure would be to throw the net worth statement out of balance. (R. 188.) As to the Asturias stock Olender asked me to leave it out

it was worthless. When he informed me about the life insurance premium he said he didn't want to involve his mother or gifts from his mother. (R. 189.) Olender went down to Fresno and got a list of items he said were gifts from his mother. (R. 190.) He said he had received gifts totalling \$10,500 from his mother. A list of these gifts appears on the last page of the net worth statement. I didn't see any records or books of Mrs. J. Olender. (R. 191.)

On Exhibit No. 10, the net worth statement, under the item of \$33,000 for bonds is the language "less held for mother purchased with her money \$20,000". I received the information as to those bonds being his mother's when I identified it on the inventory I took of the bonds on May 5, 1948. (R. 221.)

Cross-examination. U. S. Exhibit No. 20 is the inventory I took of the safe deposit box and contains on page 2 the heading "bonds being held for mother" and itemizes the bonds as follows:

2 1/4% Treasury Bonds Nos. 906F, \$5,000; 907H, \$5,000; 908S, \$5,000; 909K, \$5,000. I took those numbers off the bonds. (R. 228.) I learned that the bonds were his mother's from what I saw at the safe deposit box. Just what that was I don't have on the inventory. (R. 229.) These bonds totalling \$20,000 had some marking showing that they were the mother's bonds. There evidently was something in the box that identified those bonds as the bonds of Mr. Olender's mother. (R. 230.)

I never made up a net worth statement for the years ending 1944, '45 and '46. I figured it would be impossible

to make up anything for those interim dates. (R. 233.) I was able to make up one for the year ending 1941 because Olender had the affidavit as to the cash he had received from his father. (R. 233.) I wouldn't say the net worth I prepared for the Government for the year ending 1941 was perfect. (R. 234.)

Referring to U. S. Exhibit No. 19, the comparative net worth statement, the figures showing the cash in vault at the end of certain years were Olender's estimates of those amounts which I asked him to bring me so I could use them as a guide and through further questioning I would try to arrive at correct figures. (R. 245.) He said the figures were purely his recollection. Olender said that some period along or following 1944 that he was constantly putting money in the safe deposit box and taking it out. (R. 246.) He told me that any number of times. He told me that his sources of income were the store, an interest in this property in Fresno, interest in Government Bonds, dividends on stock. (R. 248.) He didn't advise me of any other business activities that were capable of producing any income. (R. 249.) Before I completed the net worth statement Olender brought in the single premium life insurance policy he bought and he then stated that the \$5,000 Asturias stock was worthless and would I be willing to leave it off the statement. (R. 350.) Olender brought to my attention that in 1945 he paid this \$15,800 odd dollars for paid up life insurance. (R. 251.) I said we would have to include it and it would throw his net worth out. He then said he had received certain gifts from his mother but he didn't want to involve her in the case. (R.

51.) These gifts were finally included in the net worth statement. (R. 252.)

I had a discussion with Olender and Mr. Monroe Friedman relative to the fact in April or May of 1944 there was a certain amount of money in Olender's safe deposit box. Referring to defendant's Exhibit "B" for identification, it shows that the first talk I had with Monroe Friedman was on April 16, 1948 and the last one was September 30, 1948. My talk with Mr. Friedman about money in the safe deposit box was after my visit to the safe deposit box in May and before September. (R. 257-S.) At that time Monroe Friedman said there was over \$70,000 in the box when Mr. Olender took that trip and the box was turned over to Monroe Friedman. The records show that was in 1944. I think Monroe Friedman said he counted the money at the safe deposit box both in April and May of 1944. (R. 259.) I didn't use U. S. Exhibit No. 19 for any purpose so far as the cash in the box is concerned. (R. 260.) As to U. S. Exhibit No. 19 I told the Government's agents I had given up the idea of trying to make an annual net worth as I figured it would be impossible; (R. 263) that I didn't think you could get a interim statement as to the net worth accurately with the information I had. I discussed with the Government agents on a number of times that the figures on U.S. Exhibit No. 19 were guesses all the way through. (R. 264.) U.S. Exhibit No. 19 was not intended by me to be a full, final or complete study of Olender's net worth for any of the years involved. It was merely a system of work papers for trying to get Olender to refresh his memory. The figures thereon

were originally compiled and then in the main rejected by me. (R. 268.)

Questions by the Court. When I took an inventory of the safe deposit box I believe the bonds were in an envelope or in some other form identifying them as a group. There was something on the bonds that would indicate they were the bonds of Olender's mother. (R. 202-3.)

TRUMAN H. HARLEY, Jr., called by the Government, testified in substance as follows:

In 1946 I was Personnel and Operations Officer of the Oakland main office of the Bank of America and as such it was part of my duties to prepare or supervise the preparation of Treasury Currency Reports. (R. 305.) These reports were required on transactions involving cash and currency involving large denomination bills and in amounts of over \$1,000. (R. 306.) The documents you showed me (U.S. Exhibit 29) relate to currency transactions by the defendant Olender. (R. 309.) The transactions therein reported are as follows:

November 9, 1945 Check cashed for \$25,000 for 250 \$100 bills

November 20, 1945 A deposit of 250 \$100 bills totaling \$25,000

January 14, 1946—\$50,000 purchase of War Bonds

December 5, 1945—2 cashier's checks purchased, one for \$10,000 and one for \$15,000. The memorandum states "issued cashier's check, paid cash for purchase of bonds". (R. 310)

May 29, 1946—Olender submitted \$3,000 in cash for purchase of cashier's check. (R. 311)

September 19, 1946—A deposit of \$1,000 and \$1,500.

GEORGE L. HORNE, called by the Government, testified in substance as follows:

In 1946 and 1947 I was employed as an accountant by the Asturias Import & Export Company. (R. 321.) The company was a corporation in existence about a year manufacturing toys. I set up and maintained the books of the corporation. (R. 322.) Olender made an investment in the Asturias Corporation. U.S. Exhibit 31 is the general ledger of the corporation. (R. 323.) The entry therein shows that in July of 1946 the corporation received \$35,020 against stock that was issued. It also shows to whom the stock was issued including "Milton Olender, 500 shares, \$5,000." (R. 324.) There is a further entry on December 13, 1946 showing the receipt of \$5,000 from M. Olender and was entered in the records chargeable to notes payable. It shows that the corporation received \$5,000 as a loan from Olender and is in addition to the purchase of stock in July, 1946. This \$5,000 loan was not repaid to Olender during the year 1946. (R. 325.) The last sales of merchandise by the corporation were in July, 1947 and the corporation was still paying bills as of that date. (R. 326.) The records show cash receipts from the corporation from October 1, 1947 to January 31, 1948. I am not able to state whether the stock of the corporation was worthless as of December 31, 1946. (R. 327.)

Cross-examination. There is no record of Olender having been paid back the \$5,000 which appears under Notes Payable of December 13, 1946. My opinion is the stock became worthless in 1947. (R. 328.) I can't tell from the books what the financial condition of the company was on December 31, 1946. As of that date the books might re-

flect some of the indebtedness of the corporation but not all of it. The book does not show any indebtedness to the bank, (R. 328) or what was owing to the stockholders. (R. 329.) There was no attempt made to make up a complete statement as of December 31, 1946. The fiscal year ended on June 30, 1947. (R. 329.) I cannot fix the date when in my opinion the stock became worthless. It was in 1947 when the corporation ceased operation at which time the corporation was insolvent. (R. 333.) I don't know whether on December 31, 1946 the assets exceeded the liabilities as I have no totals or any statements in front of me. (R. 334.)

C. F. CARROLL, called by the Government, testified in substance as follows:

I am a Special Agent employed by the Bank of America. U.S. Exhibit 34 is a cashier's check issued by the bank. Applications for cashier's checks are destroyed after five years so I have no application for that check. (R. 339.) U.S. Exhibit 34 is a cashier's check payable to the Army and Navy Store and endorsed by M. Olender. (R. 339.) The check is No. 25104696 dated November 19, 1945 for \$7,724. (R. 340.) I have no record showing who purchased this check. It was returned to the bank and paid on March 27, 1946. (R. 340.) The stamps on the back show that it was cleared through some bank in New York. (R. 341.)

Cross-examination. The cashier's check for \$7724 is endorsed "Army & Navy Store by M. Olender, pay to the order of Louis Levy, Army & Navy Store by Olender", then it is endorsed again "Louis Levy" and then "Saraga". (R. 345.)

HOWARD FOLEY, called by the Government, testified that he was identified with an insurance company and identified certain records and policies insuring personal property such as furs and jewelry for Olender from the years 1942 on. (R. 347 to 365, 383 to 389.)

A. D. COFFMAN, testified in substance as follows:

That he was an officer of the Bank of America at Fresno, California and produced certain records with the bank which were marked U.S. Exhibits 40 through 48 inclusive. (R. 367.) The records pertained to bank accounts and transactions of Molly Olender (Mrs. J. Olender) the appellant's mother, and Terry Olender Gamborg, appellant's sister.

The foregoing Exhibits show the following transactions:

On February 3, 1942 Molly Olender withdrew from her savings account No. 3941 the sum of \$1000 and on February 3, 1942, \$1000 was deposited in her account No. 2146. (R. 370.)

On February 3, 1946 the sum of \$200 was withdrawn from account No. 2146. (R. 371.)

On March 31, 1943 \$1000 was withdrawn from savings account No. 3941 and deposited in Molly Olender's commercial account. (R. 372.)

There were no withdrawals from the commercial account in the sum of \$1000 or more until June 4, 1945. (R. 372.)

On either January 4th or January 6th, 1944 \$2000 was withdrawn from savings account No. 3941. Account No. 16 of Terry Olender Gamborg shows a deposit on Janu-

ary 4th or 6th of \$2000 and that this money came out of savings account No. 3941. There were no subsequent withdrawals from account No. 126. (R. 374.)

On December 15, 1944 \$1000 was withdrawn from savings account No. 3941. The tag shows "To commercial account". On December 15, 1944 \$1000 was deposited in the commercial account of Mrs. J. Olender. The deposit tag shows the funds came from savings account No. 3941. (R. 375.)

On January 2, 1945 \$3000 was withdrawn from savings account No. 3941. The tag indicates it was transferred to savings No. 126. On January 2, 1945 the sum of \$3000 was deposited to the savings account of Terrence Olender Gamborg No. 126. (R. 376.)

Cross-examination. Referring to savings account No. 3941 there was a withdrawal of \$3000 on June 29, 1944 (R. 380); a withdrawal of \$3000 on January 2, 1945 (R. 381).

HERMAN B. DIETZ, called by the Government, testified in substance as follows:

I am an officer of the Security First National Bank at Fresno, California. (R. 396.) U.S. Exhibit No. 49 is the bank's ledger card of the savings account of Molly Olender, No. 5910. (R. 397.) These records show that on July 5, 1944 there was a withdrawal from this savings account of \$2500. (R. 398.) I am unable to determine what happened to this withdrawal of \$2500. (R. 399.)

MELBOURNE C. WHITESIDE, called by the Government, testified in substance as follows:

Direct Examination. I am a Special Agent of the Internal Revenue Service. On October 18, 1948 I had a conversation with Olender in the presence of Monroe Edman and Mr. Root. I asked Olender to furnish us information concerning additional assets in the form of personal effects, jewelry and furs which were not included in the net worth statement which he had submitted. (R. 403.) I also asked about his wife's savings account in the Bank of America in Oakland. He stated at that time that 100% of the deposits in that account had come from his mother-in-law who had since passed away; that he had received that money and had deposited it in this account in his wife's name. The list of jewelry, furs and other personal items was never furnished us. (R. 404.)

Here, witness testifies as to the investigation he made into the matters contained on Olender's net worth statement. (R. 405.)

As a result of my investigation I found that the net worth statement (U.S. Exhibit 10) was not complete. The bank account of Olender's wife was not included therein and we found that the \$5000 investment in the Asturias Corporation had not been included. Later we found that jewelry and furs in a large amount had not been included in the net worth statement. (R. 406.)

During my investigation we followed leads which were given to me by the defendant as to the sources of his income and the items of his assets and liabilities. (R. 408.) These have been present throughout this trial. I have examined all the documents in evidence and as a result I have made certain computations as to the net worth increase and tax liability of the defendant. (R. 409.)

(Here, U.S. Exhibit 50 was admitted in evidence and consists of 5 pages and is the computation of Mr. Whiteside. This is set forth in full in the Appendix at p. i.) (R. 412.)⁵

(Mr. Whiteside then explained to the jury the items contained upon U.S. Exhibit 50.) (R. 412 to 442.)

Cross-examination. Referring to U.S. Exhibit 50 and the \$10,000 involved in the Asturias Stock Corporation in 1946, if in fact that stock was worthless in December of 1946, there would be a capital loss allowable. (R. 449.) As the Returns are divided between husband and wife there would have been an adjustment of \$2000. (R. 491.) As to the second Asturias stock transaction if it was a loss and was uncollectible by the end of 1946 there would have had to have been an adjustment made for that also in the taxpayer's favor. (R. 450.)

There are \$82,000 of Treasury Bonds listed. Included in this figure for 1945 and in the itemization of bonds for 1946 there are \$20,000 of bonds which Olender contends belonged to his mother. (R. 450.) I first acquired knowledge that Olender claimed that those bonds were neither his nor his wife's from the net worth statement submitted to Mr. Root which I saw in October, 1948. (R. 450.) Prior to that time I had no such knowledge. Mr. Ralph R. Read was a former Special Agent. Subsequently I found some correspondence between Mr. Read and Mr. Olender. This was either in 1948 or early in 1949. (R. 451.) I made an investigation relative to who owned those bonds. They

⁵Later the Court ruled that the figures showing cash on hand in U.S. Exhibit 50, could not be used by the prosecution or the jury. (R. 927, 943.)

re purchased on December 5, 1945 with two cashier's checks which previously had been purchased with cash. The checks were for \$10,000 and \$15,000. I knew that when bonds are purchased through the bank that the bonds generally are not delivered on the same day they are purchased. (R. 452.)

In U.S. Exhibit 35 for identification, I have seen the originals of those. They were attached to a letter sent in by Molly Olender. It may have been in 1946. (R. 453.) With reference to these \$20,000 of bonds we tried to check whether there was any transfer of funds from the Fresno bank account which may have been sent to Olender for the purpose of buying these bonds. The only information other than Ringo's inventory of the safe deposit box that we had that these bonds belonged to Molly Olender was the one which Mr. Olender submitted to us. I know that Molly Olender's mother died prior to the first trial. I didn't investigate her estate. I did not make any investigation into the probate of her estate to determine whether or not these bonds were ever listed in her estate. After the last trial we did check to see what was listed in the estate and the original return filed for the estate did not include these \$20,000 in bonds. (R. 455.)

It is stipulated that Mrs. Molly Olender died June 1st or 2nd, 1951.) (R. 457.)

It was accepted from Mr. Ringo's papers the figure that Molly Olender only had \$50,000 in cash at the beginning of 1945. If it should develop that of these \$82,000 worth of bonds some were in fact not the property of either Olender or her wife, it would reduce the total income for the year 1945 by \$20,000. (R. 457.) The only other investigation we

made prior to this trial as to the ownership of these bonds was to ask the bank for information of the sale and we were unable to get the transaction from the bank. (R. 459.)

I knew at the last trial that Mr. Olender was contending that he had over \$70,000 in cash in his safe deposit box as of December 31, 1944. I didn't know of that before. (R. 463.) I didn't make any additional investigation as we had covered it pretty thoroughly. I heard the affidavit of former Judge Monroe Friedman read at the first trial of this case wherein Monroe Friedman stated that as late as May of 1944 he knew there was over \$70,000 in that box. (R. 463.) It wasn't necessary to do anything to verify or disprove that statement as May of 1944 was not a date that was material. We wanted to know how much cash he had on hand as of December 31, 1944. We used the taxpayer's own estimate rather than Mr. Friedman's estimate as of May, 1944. (R. 464.) I didn't compute the deductions that made the difference between \$50,000 and \$7200 that was left. I accepted his figure of \$7200. I couldn't verify the cash on hand back in 1945. Ringo testified that there were numerous entries into the safe deposit box and no record kept of the money going in or out. There would be no way of telling unless you had a transcript of all the money going into and out of the box. (R. 464.)

We had the books of Mr. Olender and the transcripts of his bank accounts. We had a great number of his checks for examination. We had the bank records to show what withdrawals had been made. We had in our possession cashier's checks payable to Goodman for \$20,550. We

ew they had been purchased with cash. Some of the
 nds were purchased with cashier's checks (R. 466) and
 ose cashier's checks were purchased with cash. We had
 eords of the large cash transactions, some of which ran
 high as 5, 10 and \$15,000 and we checked to see that
 s cash didn't come out of his bank accounts. (R. 467.)
 me of these expenditures were checks drawn to his per-
 nal drawing account. Whenever we found these ex-
 nditures not related to any checks on Olender's account,
 ender was given credit for the cash. We didn't compute
 e amount of cash expenditures that didn't come out of
 ender's bank account as we had no knowledge of how
 uch money would go in and out of that box. (R. 468.)
 e did know that he was entering his safe deposit box
 llowed by a transaction involving an expenditure. (R.
 9.)

I have included in the nondeductible expenditures, \$1000
 1946 for furs. That is the figure shown on the insur-
 ce policy produced by Mr. Foley. There is nothing in
 e policy showing that those furs had been acquired in
 46 other than the fact that they were added to the
 licy in that year. (R. 470.) We checked with a furrier
 Oakland, Morris Bros., relating to these furs. We asked
 r an invoice but we haven't one. (R. 471.)

(The stipulation lists these furs at the sum of \$676.65.)

I have included a cashier's check for \$7744 (U.S. Ex-
 bit 45) as an asset in 1945. (R. 472.)

As to the correspondence between Mr. Reed and Mr.
 ender I have two letters, one addressed to the Army &
 avy Store and the other to Mr. Olender on August 16,
 46 and a reply.

(The three letters were marked as Defendant's Exhibit "D" for identification.) (R. 476.)

The two documents you now show me are the originals of the photostats now constituting U.S. Exhibit 35 and they were attached to the letter now included in Defendant's Exhibit "D" for identification. (The two original documents were then made part of Defendant's Exhibit "D" for identification and marked D-1.) (R. 478.)

I found the Estate Tax Return. It is in the inventory that was filed in the Molly Olender estate itself. (R. 479.) On page 5 of the Federal Estate Tax Return there are some notations written in pencil which read "U.S. Government Bonds 20m".

The Federal Estate Tax Return was filed with the Treasury Department on December 15, 1952 after the first trial of this case. It is signed by Terry Olender Gamborg Glick, a sister of the defendant. (R. 487.) (The Federal Estate Tax Return was introduced in evidence as U.S. Exhibit 52. (R. 489.) Under Schedule "G", transfers during decedent's life, there appears the following: "If there were any other transfers made Terry Olender Gamborg does not have a record or knowledge of them". (R. 490.)

Relative to U.S. Exhibit 52 the Federal Estate Tax Return, from the time it was filed it remained in the custody of the Government. I didn't see any amended Schedule. (R. 492.)

CASE FOR THE DEFENDANT.

MILTON OLENDER, the defendant, testified in his own behalf in substance as follows:

I am married and have three children, Richard Raymond Busbee, aged 40 is my stepson, James Olender aged [redacted] and Audrey Nair, aged 27, my married daughter.

During the years 1944, '45 and '46 I ran the Army and Navy store in Oakland where I carried mostly military equipment, uniforms, etc. During those years the sources of income from which I would receive any money at all were the Army and Navy store receipts, my partnership property in Fresno, interest on stocks and bonds, gifts I might receive or money that might be entrusted to my care. (R. 550.) During those three years any expenditures made would come from the following sources: From my Army & Navy store bank account or my personal bank account or from my safe deposit box or from my share in the store or from the sale of any personal property such as furniture. (R. 551.) The Fresno partnership consisted of my interest in real property located in Fresno and there were five partners. (R. 551.)

In 1944 and 1945 sailor suits for sale in my store were very difficult to get. I was the sole owner of the Army & Navy store. My mother's name was Molly Olender or Mrs. J. Olender and my father's name was Julius Olender. My mother died in June, 1951 and her estate was probated in the Superior Court in Fresno County. My sister Terrys Olender Gamborg and I were the executors of my mother's estate. (R. 552.) My mother-in-law was named Laura Lane Foote. She died in August, 1945. (R. 553.)

During 1944 I took care of all of the affairs that my mother and I were jointly interested in. There was a safe deposit box in the Bank of America, Oakland in my mother's name and my name that was used to deposit the documents and papers relating to these joint affairs. The box number was 44. (R. 553.) In 1944 my mother brought some money up with her and asked me to put it in that box. I believe it was \$10,000. My mother resided in Fresno and she came to Oakland very often. She brought the money up in currency. Either at the end of 1944 or early in 1945 she brought up another \$10,000 making \$20,000 in the safe deposit box. (R. 554.) Defendant's Exhibit D-1 is a receipt I received from the Bank of America for the purchase of \$25,000 of 2¼ 59-62 bearer bonds. It is dated December 5, 1945. \$20,000 of that money was my mother's and \$5000 was mine. I received those bonds and put them in one of the two safe deposit boxes. (R. 555.) I put \$5000 of the bonds in my own safe deposit box and the other \$20,000 I placed in an envelope on which I wrote "The property of Mrs. J. Olender" and the numbers of each of the bonds. On May 5, 1948 Mr. Ringo went to the safe deposit box and that envelope was in the box with the bonds in it. (Defendant's Exhibit D-1 admitted in evidence.) (R. 556.) I paid for those bonds by check. I believe I bought two cashier's checks totalling \$25,000 and presented them to the person who gave me this receipt. I bought the cashier's checks with cash out of my safe deposit box. \$5000 of it was mine, the other \$20,000 was my mother's. (R. 557.) The documents you hand (Defendant's Exhibit "D" for identification) are the communications and queries from the Government and my reply thereto relative to the purchase

these bonds. (Documents admitted in evidence.) (R. 8.)

The first of these documents is dated August 16, 1946 at the letterhead of the Treasury Department signed by Ralph R. Read and addressed to defendant. It asks for an explanation of a currency transaction in the amount of \$25,000 on November 9, 1945 and also one for \$25,000 on November 20, 1945. The second letter in the Exhibit is in the same form; is addressed to the Army & Navy and is signed by Ralph R. Read and asked for the explanation of a currency transaction involving \$25,000 on or about December 5, 1945. These letters are set forth in full in the record at pages 559 and 560. The third letter is dated August 23, 1946 written by Milton Olender to Ralph R. Read in response to the two foregoing letters. It is set forth in full in the record from pages 560 to 562 and states in part as follows:

“The \$25,000 transaction on December 5th, 1945, represents the purchase of U.S. Treasury Bonds as per inclosed receipt. The bonds were purchased for the account of my morther, Mrs. Olender, a resident of Fresno, California, in the amount of \$20,000 on written instructions from her, which I have in my records. This cash was taken out of our joint safe deposit box and was part of the proceeds of the estate left to my mother by my father, which is of record. My records, which substantiate the above information, are available for your inspection.”

The authority for the purchase of \$20,000 worth of bonds for my mother I received in a letter from my mother dated November 23, 1945 (Defendant's Exhibit N" (R. 563)) and reads in part as follows:

“If you have no further need of the cash in the box, I prefer that you put it into government bonds and not into stocks, as you know only too well Dad’s experience with stocks. If you do buy the bonds, put them in our box for safe keeping.”

Following the purchase of these bonds I advised my mother thereof and received an acknowledgment from my mother dated December 14, 1945. (Defendant’s Exhibit “O”). (R. 565.) This letter reads in part as follows:

“I have been forgetting to mention those bonds you bought for me last week. When you get them, keep them up there for me; as I wrote you previously before, I still prefer that you put your money into government bonds instead of stocks. I realize the Bank of America dividends are higher and what you say about them is true. When you make your next payment to me, I may let you convince me, but I still think the bonds are the safest investment.”

I kept those \$20,000 worth of bonds of my mother’s until they were sold in 1953. (R. 565.) The bonds were sold by the Bank of America on my order and as a result I received this check (Defendant’s Exhibit “I”), payable to the estate of Molly Olender for \$18,959.40. It is endorsed for deposit only, estate of Molly Olender by Terrys Olender Gamborg, Milton Howard Olender, co-ex. The check was deposited in the Bank of America, Fresno, in the account of the estate of Molly Olender. (R. 565-6.)

(There was then admitted in evidence as Defendant’s Exhibit “P” Supplementary Inventory filed in the estate of Molly Olender on March 30, 1953 by Milton Olender. On p. 3 thereof it lists as assets of the estate \$20,000

orth of U.S. bearer bonds numbered 906F, 907H, 908V and 909K, each in the principal sum of \$5000.) (R. 567.)

The bonds purchased for my mother were coupon bearing bonds, interest payable semi-annually. I clipped the coupons and usually deposited the proceeds in my personal account and thereafter I either gave my mother the cash but generally I mailed her a check for her share of the dividends. The coupons represented \$225 interest semiannually. (R. 568.)

In 1947 my mother gave me the interest on her bonds and I reported it in my 1947 income tax. In the other years 1946, '48, '49, '50 and '51 that income was reported on my mother's income tax returns. (R. 569.)

In April, 1944 I went to San Antonio, Texas. My son was an aviation cadet there and I learned of an Army and Navy store there where the owner wanted to sell the merchandise. My wife and my daughter Sue accompanied me. (R. 569.) Before going to San Antonio I called on Monroe Friedman, a lawyer. My personal safe deposit box then was No. 56. I told Judge Friedman that I was going to San Antonio and asked him if he would go to the safe deposit box with me and if I needed any money while I was gone for him to go down and draw it out and give me a check and mail it to me. I figured if I bought this store I wouldn't have enough money with me. Mr. Friedman agreed to go with me and he met me at the safe deposit box. (R. 570.) This was two or three days before I left for Texas. It was the day Judge Friedman was put on the box as a co-tenant and my wife's name taken off. When we went to the safe deposit I opened the box in front of him, took out the money and counted it before

him, put it back in the box, closed the box and we went out and he signed on the box with me. At the time I counted this money in the presence of Judge Friedman I knew there was \$75,000 in cash, mostly in \$100 bills. Just before going to the safe deposit with Judge Friedman I had taken some money out of the box for this possible purchase in San Antonio. (R. 571.) It was 5 or \$10,000. When I got to San Antonio the store had already been sold and I didn't use any of the money I took with me to San Antonio. On my return to Oakland I again saw Judge Friedman and we again went to the safe deposit box, at which time Judge Friedman's name was taken off the record as a tenant of box 56. The money was again counted and the sum remained the same. (R. 572.) The money I took to San Antonio I put back in the safe deposit box a day or two after Judge Friedman and I were there. I have known Monroe Friedman since 1914. He had acted as my attorney on many occasions and I had supreme confidence in his honesty and integrity. (R. 573.)

In 1944 I received money from my mother as gifts. I don't recall the dates now. I think there were three occasions in 1944 when I received \$1000, then \$2000 or \$3000. (R. 573.) I can't remember the dates now but I gave Mr. Ringo information as to these gifts which was included in the net worth statement filed with the Government. Looking at the net worth statement, U.S. Exhibit 10, it refreshes my memory as to the dates. In 1945 I received the following gift from my mother: \$3000 in January. In 1944 I received three gifts, one for \$2000; one in July for \$2500; one in December of \$1000. (R. 574-5.) I didn't deposit any of these gifts in my bank accounts. I put the money in my safe deposit box. (R. 582.)

At the time I purchased the cashier's checks payable to George Goodman (Exhibit 6) I didn't know him and don't remember of having any business dealings with him prior to January, 1944. I took the money to purchase these \$20,550 worth of checks out of my safe deposit box. (R. 583.)

On U.S. Exhibit 36 for identification it shows that the bank balance of the Army and Navy Store on January 4, 1944 was \$1183 and on January 9, 1944 was \$5600 and on January 22nd was \$4900. (R. 583.)

U.S. Exhibit 37 shows that my personal account with the Bank of America had a balance on January 1, 1944 of \$4041 and on January 22nd of \$181. (R. 584.)

For the \$20,550 checks issued to George Goodman I received 822 sailor suits. I didn't carry on any negotiations with George Goodman in procuring these suits. I dealt with Louis Levy, owner of the Western Military Supply Co. with whom I had done business. (R. 585.) After these checks payable to George Goodman were issued I gave them to Mr. Levy. Levy told me he thought that he could buy some sailor suits for me on his trip to New York. (R. 586.) Levy asked me to make out checks in various amounts. The first time he asked for three checks and when he got to New York he wrote to me and asked me to mail him additional checks. He figured he would be able to buy the sailor suits in lots of 100 at \$22.50 and \$23.50. That is why the checks were made out that way. (R. 587.) Levy asked me to have the checks made out to George Goodman. I distinctly told Levy that I wanted sailor suits in sizes 34 to 37 and nothing larger as large sizes couldn't be sold. I had no way of cutting down

large size sailor suits to small sizes. The most popular size was small ones. (R. 588.) After Levy went to New York I received sailor suits from the Seagoing Uniform Co. As soon as I opened up the suits they were mis-marked. A 34 was as big as a 38. A 35 was what a 39 should be. (R. 589.) I complained to Mr. Levy when he came back in February or March. I made no complaint to George Goodman as I had nothing to do with him. Levy was the one I bought the merchandise from. (R. 590.) Levy said he could do nothing about it; that he had bought the suits and the sale was final. Levy said he'd see if he could sell some of them for me. I put the suits in my basement where they remained over a year. In 1945 Levy found someone who wanted to buy 200 suits (R. 591), for which I received two cashier's checks from Mr. Levy at \$2500 each. Exhibits "J" and "K" are the two cashier's checks made out to L. Levy for \$2500 each. They are endorsed first by L. Levy and then by me for the Army and Navy Store. They were deposited in the bank account of the Army and Navy Store and entered in the books as capital investment. (R. 592.) I didn't put any entry in the books of the Army and Navy Store of this expenditure of \$20,550 (R. 593), because the transaction was uncertain. I couldn't use the merchandise and nothing had been done with it. The cash to buy these suits had come out of my personal funds to start with and when I got the \$5000 back I entered it on my books as a capital contribution. Levy didn't tell me to whom he sold the 200 suits. (R. 594.) Later in 1945 Levy sold 280 more of these suits for \$7000. (R. 595.) Levy said he was going to New York again and thought he could get me

some more sailor suits and he retained this \$7000 and took it to New York with him. In 1945 I disposed of about 20 more of the suits. The proceeds went into my cash register. (R. 596.)

When I received these 822 suits in 1944 I didn't include them in my inventory at the end of that year. I didn't know what was going to happen to them; whether I could sell them or not. I hadn't made any entry of their purchase so I didn't make any entry in the inventory. (R. 597.) In my 1945 inventory I included 322 of these suits, most of which were sold in 1946. (R. 597.) The 480 suits that Levy sold for me were sold at the same price I paid for them. The \$7000 Levy retained he gave to Moe Saraga, a dealer in New York. (R. 598.) About the same time around August or September in 1945 I had a transaction with Moe Saraga. I gave him a series of checks in \$3600 denominations totalling \$18,000 on my store account. Then I mailed him a check for \$6500 on my store account making a total of \$24,500 plus the \$7000 that Levy had given him. (R. 600.) The document you show me (Defendant's Exhibit "R") is an invoice from M. Saraga to the Army and Navy Store.⁶ (R. 601.)

U.S. Exhibit 34, cashier's check payable to the Army and Navy Store for \$7724 is endorsed Army and Navy Store by M. Olender, pay to the order of Louis Levy and subsequently endorsed by M. Saraga. Saraga couldn't furnish the rest of the merchandise for me. He had delivered \$23,725 thereof and he refunded me the difference

⁶The Saraga invoice dated July 31, 1945 shows the sale to the Army and Navy Store of 1000 suits at \$25 each, total \$25,000.

by that check. I gave the check back to Mr. Levy who said that Saraga could furnish me that merchandise. I received that money back by another check. (R. 603.) I never received the additional merchandise. This check for \$7724 represented the \$7000 that Levy first took to Saraga (R. 604) and the \$724 was for the 49 undelivered sailor suits. This \$7724 was first returned to me by Saraga's personal check which I put in my bank for collection as the check was postdated and it was returned to me for not sufficient funds. I redeposited it and I got a check for it which was satisfactory. (R. 605.) It may have been that the same check was put through twice for collection. The bank charged me \$1.00 for the collection service which left \$7724. (R. 607.)

Defendant's Exhibit "S" is my individual income tax return for the year 1944. (R. 611.)

(Here, witness testifies as to certain income from the Fresno partnership property he received during various years.) (R. 612.)

The money I received from the Fresno property I put in my safe deposit box. It didn't go into my bank account. The moneys I had in my safe deposit box during 1945 and 1946 did not remain static. I constantly put money in such as income from Fresno, interest from bonds, maybe checks that I had cashed in the store (R. 614), and very often I would take cash out of the safe deposit box and expend it (R. 615).

Defendant's Exhibit "T" for identification is two cashier's checks for \$248.26 and for \$1911.77 issued to Barney's Clothes Shop. They were purchased in 1944 out of money in my safe deposit box. (R. 616.)

In 1946 I gave \$5000 for stock in the Asturias Corporation and later in the year gave the corporation \$5000 as loan. I have never realized anything back from these transactions. (R. 617.) I didn't advise Mr. Ringo in 1948 of this loan to the Asturias Corporation because I knew it was worthless at that time and there was no purpose in declaring it. It had been declared worthless by the U.S. Government in 1947. (R. 618.)

(Defendant's Exhibit "U", a statement from the Internal Revenue Department, determining that the stock of the Asturias Import & Export Corporation and stockholders' loans were deemed to have become worthless on approximately October 1, 1947.) (R. 619.)

Defendant's Exhibit "V" are three deposit slips in the account of Olender and Alkus, of which account I had control. I opened it up in the name of Olender and Alkus for business transactions or private bond purchases between Mr. Alkus and myself. In either 1942 or 1943 Alkus and I sold around \$20,000 worth of raincoats to the United States and twelve or thirteen thousand dollars worth of gloves. I ran that transaction through this account and we divided the profits. The three deposits in Defendant's Exhibit "V" had nothing to do with Mr. Alkus. (R. 621.) After the transaction with Alkus terminated in 1943 the account was kept alive as my sole account. The deposits on Defendant's Exhibit "V" show a deposit in 1944 of \$1500, in May, 1946 of \$1700 and on December 18, 1946 of \$2500. (R. 622.) All that money came out of my safe deposit box. (R. 623.)

Defendant's Exhibit "W" are deposit slips representing deposits into my personal account. (R. 623.)

(The books of the Army and Navy Store were then introduced in evidence as U.S. Exhibits 12, 13, 14, 15 and 16.) (R. 624.)

(By stipulation, three books of account of Moe Saraga were introduced into evidence as Defendant's Exhibits "X", "Y" and "Z".) (R. 625.)

Defendant's Exhibit "AA" are deposit slips dated November 20, 1945 for three trustee accounts opened by me for \$3000 each for my three children. (R. 625.) I took these funds from my safe deposit box in cash and deposited the cash to these three accounts. (R. 626.)

Defendant's Exhibit "AB" is a bank book of the Olander and McGrete account opened on May 1, 1946. It shows a deposit on May 1, 1946 of \$5000 and on May 21, 1946 of \$750.20. (R. 627.) Those deposits came from my safe deposit box. The venture with McGrete was never consummated. I had expended \$750.20 and received that back. I controlled the account and it remained my property. (R. 628-9.)

Cross-examination. Referring to the expenditure of \$15,833.46 for the purchase of the life insurance policy, there were two \$15,000 transactions at that time. The money either came out of my safe deposit box for the life insurance or it came out of the store check for the life insurance. I paid the life insurance by cashier's check which I bought either with cash or with a check from the store. (R. 633.) When I told Mr. Ringo about the purchase of the life insurance he probably told me it would throw my net worth out of balance. At that time I asked him to take off the Asturias stock because I knew it was worthless in 1947. (R. 635.) In my mind the stock was

worthless in 1946. (R. 636.) In December of 1946 I loaned the Asturias Corporation \$5000 and also co-signed a Note at the bank after that date. I was a director of the corporation. (R. 637.) I didn't tell Ringo about the second \$5000 transaction with the Asturias Corp. It was shortly after that I told him of the loans from my mother. (R. 641.) I obtained the information about the loans from my mother by going to Fresno and my mother checked in the times she thought she had given those gifts and gave me a list which I brought back to Mr. Ringo. I didn't go to the bank and look at the records. (R. 642.) I told Ringo that those were the dates that my mother thought she had withdrawn money from the bank and given it to me. Today I have doubts as to the exact date in which those gifts were turned over to me. (R. 643.) My mother never to my recollection ever made a gift to my sister that she didn't make a like gift to me. There were not two withdrawals of exactly the same amount on the same date in my mother's bank account. She also had cash. (R. 644.) My mother from whatever place she had it took the same amount of cash that she transferred into my sister's account and gave it to me. (R. 645.)

(Defendant's Exhibit "Q" for identification offered in evidence by the Government. It is a letter from Olender's mother to Olender dated July 11, 1944 and reads as follows:

"Milton dear: As I told you over the phone, I have \$7,500 in safe and will get a cashier's check for \$2,500 and bring it down with me when I come, which will be on July 21st on Santa Fe Streamliner, which leaves Fresno at 1:00 p.m. If you think it best, I can leave cash where it is 'til you want me to bring it.

I am leaving that all up to you. Just drop me a postal saying, 'Bring package,' if you want it and 'Don't bring package,' if you don't want it. Destroy this letter after reading.'" And then some reference to the weather.) (R. 647.)

The letter refers to part of the cash which she brought up for the bonds and the \$2500 gift which she was bringing. She came up on July 21st and brought with her \$7500 and \$2500 in a cashier's check. (R. 648.) The \$2500 was a gift to me. (R. 649.) I originally didn't tell Ringo about the gifts from my mother as I didn't want to involve her in my net worth statement. She was very ill at the time. (R. 654.)

U.S. Exhibit 56 is the savings account of my wife, Betty Olender with the Bank of America. (R. 691.)

U.S. Exhibit 57 is an application for a cashier's check and a cashier's check which was ultimately deposited in my wife's savings account on June 7, 1946. (R. 692.)

Exhibit 46 shows a deposit of \$5000 on December 20, 1945. It came from a check on my store account. On June 7, 1946 is a \$3000 deposit which is related to the \$3000 cashier's check, U.S. Exhibit 57. I had received 5000 odd dollars as a result of the sale of my home in Fresno. (R. 693.)

On October 18, 1948 I had a conversation with former Judge Friedman, Mr. Root and Mr. Whiteside at which time I told them I had received some money from my mother-in-law, Mrs. Laura Jane Foote. (R. 694.) I told them that when Mrs. Foote died in 1945 I put \$3000 in my wife's savings account that I had received from Mrs.

foote. (R. 695.) After Mrs. Foote got off the old age pension system she gave me the \$3000 which she had acquired partly from me and partly from her daughter and her son, partly from the sale of birds and dogs and blankets that she crocheted and many other ways. She turned it over to me in 1945 in currency, for me to hold for her grandson. (R. 696.)

I had that money in the safe deposit box since 1942 at which time there was at least \$75,000 which I received from my father in Fresno. (R. 700.) I didn't use any of the money I put in my safe deposit box during 1942. It was all on hand at the end of the year. I don't remember using any of it in 1943. In 1944 I took out the \$20,550 for the sailor suit transaction and at the end of 1944 I took out 2 or \$3000 which I paid to Barney's in Los Angeles. (R. 712.) At the end of 1944 there was over 70,000 in my safe deposit box. At the end of 1945 I don't remember how much cash there was in the safe deposit box. (R. 715.) At the end of 1946 there was no money in the safe deposit box. (R. 716.) There was considerable money in my safe deposit box at the end of 1946 but I can't approximate it. It wasn't in the thousands. (R. 724.)

When I gave Levy the checks payable to Goodman, Levy didn't know whether he was going to be able to get the 100 suits or 300 suits. He asked me to give him the checks. He asked me for a series of checks. (R. 747.) I can't remember whether Mr. Levy was in New York but he may have phoned, wired or written me and in some way he communicated with me and asked me to send these additional checks. (R. 747.) Levy told me to make

the cashier's checks payable to the order of Goodman. (R. 748.) I received some of the Goodman suits in January, February and some in March and there could have been some a month or two later. They came in different lots. (R. 750.) I put the Goodman suits in my basement because of the sizes. I have two basements which I call basement No. 1 and basement No. 2. I put the suits in basement No. 1. (R. 753.) I took the store inventory at the end of 1944 and 1945. (R. 754.) I sold none of the Goodman suits during 1944. (R. 757.) I had one other transaction with Goodman in 1944 for \$1380. I did not buy any other suits from Goodman in 1945 or 1946. (R. 758.)

U.S. Exhibits 60, 61 and 62 are my merchandise inventories for the end of 1944, 1946 and 1947. (R. 759.)

U.S. Exhibit 52, the sales agency invoice which went from Mr. Levy to Mr. Lerman, I had nothing to do with the preparation of that invoice and didn't tell Levy what sizes to put thereon. I didn't know those suits were being sold to Mr. Lerman. The size markings on the suits were incorrect. (R. 769.)

U.S. Exhibit 63 is a document prepared by Mr. Hellman during the course of the last trial and reflects so far as my books and records show, the purchases I made of Navy uniforms during 1944, 1945 and 1946. (R. 783.)

U.S. Exhibit 74 are railway receipts reflecting the receipt of cartons from George Goodman. (R. 788.) These express receipts show my receipt of cartons from George Goodman on the following dates: January 14th, 15th, 21st and 26th, February 14th, 18th and 25th, 1944. (R. 791-2.)

With reference to U.S. Exhibit 34, the check for \$7724, the origin of that money was the sale of some 280 suits which Levy made out of the 822 I had on hand from Goodman. (R. 795.) Goodman never turned that money over to me; he took it to Mr. Saraga. (R. 795.) I eventually received back from Saraga \$7724 representing \$7000 as a refund on a portion of orders Saraga was unable to fill and \$724 as a refund on 49 suits. (R. 796.) Out of the 7000 Saraga kept \$500 to complete the billing for \$5,000 worth of suits leaving \$6500 plus the refund on 49 suits at \$25 making \$1225 or a total of \$7725 less \$1.00 charged by the bank for collection, leaving \$7724 which I deposited to my personal account. (R. 797.)

Redirect Examination. Defendant's Exhibit "AD" is the merchandise inventory of the Army & Navy Store for January 1, 1944 and shows at that time I had 346 flannel suits on hand. (R. 801-2.)

U.S. Exhibit 56, the savings account of my wife, shows the withdrawal of \$2500 on May 12, 1947. (R. 803.)

Defendant's Exhibit "AE" is a deposit slip showing that on May 12, 1947 there was deposited to the account of my wife's son R. R. Busbee, \$2500. (R. 803.) Prior to Mrs. Foote coming to my home before her death she had been living in Fresno. She died in August of 1945. (R. 795.) She told me she had this money and she wanted me to keep it for her and when Richard came out of the Marine Corps she wanted that used for a down payment on his home. She gave me the money and I think I put it in my safe deposit box. I transferred the equivalent of \$2500 to my wife's bank account in December of 1945 by drawing a check on my store account for \$5000 and started

my wife's bank account with it. (R. 806.) I told my wife that \$2500 of the money was what Mrs. Foote had given me for Dick. (R. 807.)

In December of 1946 I came to the conclusion that the stock in the Asturias Corp. was worthless. In December of 1946 I loaned that company \$5000. I did so to try to save the company. (R. 807.)

My sister Terry Olender Gamborg and I were co-executors of my mother's estate. We were on very unfriendly terms. (R. 814.)

Defendant's Exhibit "AK" is the savings passbook of Molly Olender in the Securities First National Bank, Fresno Branch, No. 59810 and shows a withdrawal of \$2500 on July 5, 1944. (R. 829.)

Questions by the Court. At the beginning of 1945 I had between \$70,000 and \$75,000 in my safe deposit box. At the end of 1945 I cannot approximate how much cash I had in the safe deposit box. (R. 847.)

MONROE FRIEDMAN, testified in substance as follows:

I have been an attorney-at-law since 1920 with the exception of about 13 months during which I was United States District Judge for the Northern District of California. I have known the defendant about forty years and have acted as his attorney. In April, 1944 I had a transaction with Olender that culminated in my visiting a safe deposit box in Oakland. (R. 498.) He came to see me at my office and stated that he and his family were going to Texas later that month; that he had a son in the Armed Services who was stationed in Texas; that he would be

for a few weeks or a few months and while there he was going to look around to see if he could open up some place down there; that while he was gone he would like to have someone in Oakland who he could trust who would have access to his safe deposit box. He asked me to put my name on the safe deposit box during the period of his absence so I would be able to do whatever he dictated me to do without his coming back to Oakland and I said I would. (R. 499.) A couple of weeks later he called up and said he was leaving for Texas and would I meet him at the Bank of America, 12th & Broadway, because he wanted my name to go on his box. We both went to the bank together and we both went in. When we came out the clerk there presented a card. I believe the box had been in the name of Olender and his wife and two cards were presented so that it would then be in the name of Mr. Olender and myself and he gave me the key. (R. 500.)

Defendant's Exhibit "F" dated April 22, 1944 contains my signature. (R. 501.)

(Exhibit "F" is the record of the Bank of America in Oakland and refers to safe deposit box 56 and contains the signatures of Olender, Milton and Friedman, Monroe.)

On May 5, 1944 the box was surrendered and transferred to a single card. (R. 501.) On April 22nd Olender took his safe deposit box; we sat down; Olender opened the box and I saw currency in it. Olender counted the currency in my presence. (R. 502.) There was over \$10,000, two or three hundred dollars more than \$70,000.

On May 5th, 1944 I met Olender at the bank. My name was taken off the box and I gave him back the key. From

April 22nd to May 5th, 1944 I hadn't entered the box at any time. (R. 503.)

The document shown me is a duplicate original containing my signature that was sworn to on September 13, 1948. Olender came to me in 1948, stated the Internal Revenue Department was asking him some questions and he discussed with me as to the fact that this money was in his box four years before and asked if I would make a statement concerning what I personally knew so I drew up this statement (affidavit) as to what was my recollection in 1948 as to what had happened four years before. (R. 504.)

(The affidavit testified to by the witness was marked Defendant's Exhibit "G" for identification and subsequently admitted in evidence. (R. 881.)

Cross-examination. In April of 1944 I was representing Mr. Olender as his lawyer in general matters. The currency in the safe deposit box was mostly in \$100 bills. I would say we were there from 10 to 15 minutes. Olender counted out the currency. (R. 507.) There were bonds in the safe deposit box and some papers which I didn't examine. I probably gave Olender some kind of a memorandum but I don't recall it. I didn't make any other memorandum as to the contents of the box. (R. 508.) I think some memorandum was made about the money. I think there was a memorandum that was initialed or signed. I don't recall it exactly. On May 5th the money wasn't counted again. (R. 509.) In 1948 Olender told me where the money in the safe deposit had come from. (R. 512.) In 1948 I drew up his affidavit and the affidavit of his mother who has since died. In 1948 I think there were

some affidavits in connection with the Goodman checks. (R. 513.) Olender's mother furnished me with the information which was included in the affidavit I prepared for her. She came to my office. (R. 514.)

C. F. CARROLL testified in substance as follows:

I am identified with the Bank of America in Oakland, California. I have brought records of the bank showing the sale of bonds for the estate of Molly Olender in July, 1953. The first document is the order to sell. It is signed for the estate of Molly Olender by Milton Olender. (Defendant's Exhibit "H".) (R. 517).

(Exhibit "H", the order to sell the securities, was dated July 13, 1953 and lists the securities as 4 \$5000 TB 2 $\frac{1}{4}$ % bonds numbered 906F, 907H, 908J and 909K.) (R. 518.)

Pursuant to the order the bonds were sold and a cashier's check was issued by the bank. (Defendant's Exhibit "I", is check payable to the order of estate of Molly Olender for \$18,959.40 and is endorsed "for deposit only, estate of Molly Olender by Harry (sic) Olender Gamborg, Milton Olender, co-ex.) (R. 520.)

MORRIS LERMAN testified in substance as follows:

In 1945 I was engaged in operating an Army-Navy store at 915 Broadway, Oakland. In 1944 I knew Mr. Louis Levie who was in the wholesale supply of military articles. (R. 524.) In 1945 I had two transactions with Louis Levie involving the purchase of sailor suits. Each transaction amounted to \$2500 and 100 suits were in each transaction. (R. 525.) I paid Mr. Levie with cashier's checks which I purchased from the American Trust at

14th and Broadway. (The two checks and registers admitted in evidence as Defendant's Exhibits "J", "K", "L" and "M".) (R. 526.) I received the sailor suits as a result of the transaction with Mr. Levie. The suits were mismarked as to size. (R. 527.) They were not truly marked. A 38 was a 42. During the war the most popular sizes of sailor suits were 34, 35, 36, 37 and some 38's, very few 40's or 42's. During 1945 I had three tailors in my establishment for the purpose of making alterations. (R. 528.) I did not know where these 200 sailor suits came from.

(Defendant's Exhibits "J" and "K" are two cashier's checks, one dated May 14, 1945 and one May 15, 1945, each payable to the order of L. Levie for \$2500 and each endorsed L. Levie and M. Olender.) (R. 529.)

(Defendant's Exhibits "L" and "M" are registers of the bank as to the issuance of the two cashier's checks showing the purchase by Lerman Co. Inc., and that each check was paid on June 20, 1945.) (R. 530.)

Cross-examination. In this transaction I bought 200 suits from Mr. Levie. I picked them up myself at Mr. Levie's office. (R. 532.) I had asked Mr. Levie several times to send us surplus merchandise of suits. He called me one day to secure a check and bring it over and I could have the suits. (R. 534.) When I found the sailor suits were smaller (sic) than the sizes I had the greatest call for, I think I notified Mr. Levie. The invoices you show me I got in connection with the purchase (R. 537) of the 200 sailor suits from Mr. Levie. Those are the only sailor suits I ever purchased from Mr. Levie. (R. 538.)

Redirect examination. When I complained to Mr. Levie about the size markings in the suits he said he wasn't the manufacturer and that he didn't know anything about the markings. (R. 545.)

LEWIS LEAVY testified in substance as follows:

In 1944 and 1945 I was a wholesale distributor of military supplies. We were not handling uniforms. I handled uniforms only as a side line and not as part of my business. (R. 849.) I have known Milton Olender since 1942. He has been a customer of mine through the years.

At the end of 1943 or beginning of 1944 I purchased for Olender about \$20,000 worth of sailor suits from George Goodman in New York. (R. 850.) Some time after I returned from New York Olender called me and told me that the suits that Goodman sold him were improperly marked and the sizes were not correct; that he was having trouble. After Olender complained to me I wrote to Goodman regarding the sizes and never got a reply from him. (R. 851.) Subsequently I sold 200 of those suits to Mr. Lerman at \$25 each and gave the proceeds to Mr. Olender. Subsequently I sold about \$7000 worth of the suits for Olender. I didn't tell Olender I sold the suits to Mr. Lerman or Mr. Lerman for whom I was selling the suits. (R. 852.)

In 1944, Mr. Lerman asked me if I could get some suits for him. I spoke to Olender and told him that I could sell some suits to Lerman and Olender said he didn't want to sell them to his competitor. On the second disposition of these suits for \$7000 I took this money to New York and contacted Mr. Saraga and turned the \$7000 over to him, for which I purchased some small sizes for Olender.

This was the result of an understanding between me and Olender when I took the money to New York. (R. 853.) Later Saraga returned the \$7000 to me because he couldn't deliver any of the suits. He returned it by check payable to the Army & Navy Store and this check bounced. Some time after he sent a check made out to me which I turned over to Olender. While I was in New York I bought some suits a couple of days before from Saraga for Olender in the amount of \$18,000. Olender sent that money to me while I was in New York and I turned it over to Saraga. The \$18,000 was in addition to the \$7000. (R. 855.)

Cross-examination. Before I left for New York in 1943 or 1944 Olender asked me whether I could locate sailor suits for him. (R. 856.) When I went to New York I didn't know I was going to purchase the suits from Goodman. I did not take the cashier's checks with me that were purchased by Olender to the order of Goodman. I didn't know Goodman at the time. It was while I was in New York that I arranged the deal with Goodman and I either telephoned or wrote to Olender about it. (R. 857.) The reason that Goodman's name appears on the cashier's checks is that I must have taken it up with Olender that I made a deal for him and to send the money. I don't remember why the checks were made out in the particular amounts. (R. 858.) In all probability subsequent to the purchase of the first series of sailor suits with the first three checks I arranged to purchase additional sailor suits and I must have communicated that information to Mr. Olender and to send forward some more cashier's checks and to put Goodman's name on them. (R. 859.)

I don't remember how long after the suits were delivered to Olender that Olender called me about the mis-markings. I immediately communicated with Goodman. I have no copy of the letter. (R. 862.) I never received a reply from Goodman. I took the matter up with Goodman again when I was in New York and he said he would make good; that he would send me some small sizes. I believe he shipped Olender a small lot of small sizes. (R. 863.)

Olender started pestering me to get rid of those suits and Mr. Lerman came over one day and I told him I thought I could get a few suits for him, a couple of hundred. He said he would take them at \$25 a piece. I got word of Olender and told him I could sell 200 suits. (R. 864.) I didn't tell him to whom. Olender delivered the suits to my place of business and Lerman picked them up there. (R. 865.) Lerman gave me two cashier's checks for \$2500 each and I endorsed those over to Olender. (R. 866.)

I received complaints from other customers concerning the sizes of the suits which I was handling. The customers complaining were the ones that had no tailors to fix suits. (R. 870.)

At the time I made the transfer of the suits from Olender to Lerman I made out an invoice. U.S. Exhibit 33 was done in my office. (R. 870.) At the time I sold those suits to Lerman I knew I wasn't shipping him the proper sizes but I knew he had tailors that could fix them. I didn't tell Lerman the suits weren't properly marked. Lerman complained to me that they were not properly marked

soon after he got them. He said the sizes didn't correspond with the tickets. (R. 871.)

The remainder of the suits that I sold for Olender for \$7000 I collected the money in checks and kept them until my next trip to New York. When I went to New York I either got a cashier's check or took all the checks. I don't remember which and gave them to Saraga. (R. 875.) The sale of the \$7000 worth of suits covered quite a period of time. I don't remember just what I did with the checks I got for those suits but I didn't give them to Olender. (R. 876.) I don't remember the names of the customers to whom I sold the \$7000 worth. They were not all sold to one person. They were all Army and Navy stores. (R. 877.)

(It was here stipulated that Defendant's Exhibit "G" for identification be admitted in evidence and that the same was a carbon copy of the Monroe Friedman affidavit attached to Olender's net worth statement of September 13, 1948.) (R. 881-2.)⁷

GOVERNMENT'S REBUTTAL.

In rebuttal the Government called John Sanchirico of Brooklyn, New York, Executive Vice President of the Sea-going Uniform Corporation. This witness testified over the objection of appellant and the substance of his testimony and of the Exhibits introduced during his testi-

⁷The affidavit of Monroe Friedman made in 1948 is substantially the same as his testimony at the present trial.

mony, is set forth hereafter in Specification of Error No. VI.

COURT'S INSTRUCTIONS.

The Court instructed the jury in part as follows:

“In many net worth cases the government relies on the taxpayer’s statements made during the course of a governmental investigation in order to establish vital links in the government’s case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the government’s case be corroborated. In this connection, the \$50,000 cash item and the \$7200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath.” (R. 927.)

After the jury was instructed the prosecutor took an exception to the foregoing instruction of the Court and appellant’s attorney called the Court’s attention to what he considered a conflict in the instructions. (R. 942-3.) Whereupon the Court called the jury back and instructed them as follows:

“The Court. It has been called to my attention, ladies and gentlemen, that perhaps there is some confusion from a statement I made. I asked you not to draw any inference against either side because of rulings that I made throughout the trial. I was re-

ferring to the rulings I made with regard to the admission or exclusion of evidence. I didn't mean that you should disregard any statement to you that you cannot consider the \$50,000 or the \$7,200 item in that Exhibit 50. I mean that you cannot consider it. So don't disregard that ruling. The rulings that I had reference to were the rulings made throughout the trial during the ordinary objections by the government or by defendant's counsel to rulings on evidence." (R. 943.)

At the conclusion of all the evidence in the case appellant moved the Court for a judgment of acquittal on each count of the indictment (R. 915), which motion was denied by the Court.

A motion for new trial (R. 18) was made and denied. (R. 20.)

SPECIFICATION OF ERRORS.

I. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENTS OF ACQUITTAL MADE AT THE CONCLUSION OF ALL THE EVIDENCE IN THE CASE.

At the conclusion of all the evidence in the case appellant made the following motion for judgments of acquittal as to each count of the indictment, which motion was denied by the Court:

"Mr. Friedman. If the Court please, at the conclusion of all the testimony in the case, both sides having rested, I desire to move the Court for certain judgments of acquittal. And while the motions in part have not been segregated, I would like them to apply to each of the counts in the indictment. In other words, I don't want to repeat it four times.

Defendant moves for judgment of acquittal on counts 1, 2, 3 and 4 of the indictment on each of the following grounds:

A. That the evidence is insufficient to establish the charge contained in each of the four counts of the indictment.

B. That, absent the net worth statement of the defendant, which is Exhibit 10 in this case, and alleged admissions of the defendant as testified to by the revenue agents in the case, Mr. Root, Mr. White-side and/or Mr. Blanchard, there is no independent proof of tax evasion as to each year involved in the indictment.

C. That there is no corroboration of the extra-judicial admissions of the defendant.

D. That the opening net worth of defendant as of December 31, 1944 has not been established to a reasonable certainty. And may I interpose: In my motion when I say 'defendant' I am referring, of course, to the defendant and his wife.

E. That the closing net worth as of December 31, '45 and the opening net worth for the year 1946 has not been established to a reasonable certainty.

F. That the closing net worth as of December 31, 1946 has not been established to a reasonable certainty.

G. That the government has failed to follow leads supplied by the defendant as to whether defendant's mother owned \$20,000 worth of bonds included in the stipulation as part of the \$82,000 of bonds in defendant's possession at the end of 1945, and has failed to follow leads as to the amount of cash money in defendant's possession on December 31, 1944.

H. That the government has failed to credit defendant's opening net worth on December 31, 1944

with \$7,724 in cash or assets which produced the claimed assets of \$7,724 which is Exhibit 34 in evidence in the year 1945.

I. That as to cash expenditures of defendant during 1945 and 1946, the government has failed to establish and the evidence fails to establish any source of income other than the Army and Navy Store, defendant's Fresno property, interest on stocks and bonds or gifts or trustee funds received by defendant, and has failed to establish that any such cash expenditures in 1945 and 1946 were not from funds or property owned by defendant prior to December 31, 1944." (R. 915.)

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- II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 1 OF THE INDICTMENT.
 - III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 2 OF THE INDICTMENT.
 - IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 3 OF THE INDICTMENT.
 - V. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 4 OF THE INDICTMENT.
 - VI. THE COURT ERRED IN ADMITTING IN EVIDENCE, OVER APPELLANT'S OBJECTION, THE REBUTTAL TESTIMONY OF JOHN SANCHIRICO AND U.S. EXHIBITS 66 TO 71 INCLUSIVE.

In rebuttal the Government called as a witness John Sanchirico who testified from records of the Seagoing Uniform Corporation, to certain transactions between said corporation and George Goodman in 1944, resulting in certain claimed shipments of sailor uniforms to appellant. Certain invoices and shipping memoranda (U.S. Exhibits 61 to 71) were introduced in evidence. All over the objection of appellant.

As the witness' testimony and said Exhibits are quite lengthy, we set forth the same in the Appendix hereto at page v together with the objections of appellant.

ARGUMENT.

The first point relied upon by appellant is the insufficiency of the evidence to establish to any degree of certainty any opening or closing net worth, resulting in a failure of proof as to each of the four counts of the indictment.

As counts 1 and 2 relate to the reporting of income for the year 1945 and counts 3 and 4 relate to the year 1946, said separate returns of husband and wife being made on a community property basis, we will discuss counts 1 and 2 under the same heading and counts 3 and 4 under one heading.

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSES SET FORTH IN COUNTS 1 AND 2 OF THE INDICTMENT. (Specification of Errors Nos. I, II and III.)

The failure of the Government to establish to a reasonable certainty appellant's net worth as of December 31, 1944 and December 31, 1945 constitutes a failure of proof as to counts 1 and 2 of the indictment. (*Holland v. United States*, 348 U.S. 121; 99 L. ed. 150.)

Appellant contends that the Government either failed to establish the opening and closing net worths, or that the evidence established such opening and closing net worths as to result in no understatement of taxable income.

In these regards we contend (1) that there was a substantial and undetermined amount of cash on hand on the opening net worth date or that it must be considered there was in excess of \$70,000 in cash on said date; (2) that the Government has failed to credit in the opening net worth, the sum of \$20,550 representing sailor suits on hand; (3) that the Government has erroneously included in the closing net worth the sum of more than \$27,724.

(a) The cash on hand as of December 31, 1944.

The Government in computing appellant's net worth as of December 31, 1944 credited appellant with the sum of \$50,000 cash in his safe deposit box. (U.S. Ex. 50, Appendix p. i.) The Court ruled that this figure could not be relied upon or considered by either the Government or the jury in determining the issues herein involved. (R. 927, 943.) Thus, so far as the Government's computations are concerned, the opening net worth erroneously failed to include any cash on hand. Although the evidence established that Olender must have had a substantial amount of cash on hand, this ruling of the trial Court left the evidence in the following situation: Either there was an undetermined substantial amount of cash or there was between \$70,000 and \$75,000 on hand on December 31, 1944.

The first reference to this amount is found in Olender's net worth statement submitted to the Government on September 13, 1948, prepared by the accountant Ringo. (U.S. Ex. 10.) This Exhibit credits Olender with having \$75,000 cash in his vault on December 31, 1941. This Exhibit also refers to an affidavit attached to the net worth

statement (but not introduced at the trial) as to the creation of this fund. Ringo testified that in preparing the net worth statements he brought people in and examined them to confirm what Olender had told him as to the creation of this fund, as to the wealth of Olender's father and that his father had sums available from which this fund was created. (R. 160.)

In April of 1944, former Judge Monroe Friedman accompanied Olender to his safe deposit box, at which time, he testified at this trial, there was slightly in excess of \$70,000 in Olender's safe deposit box (R. 503) and that said amount was still in the safe deposit box on May 5, 1944. In 1948 Monroe Friedman executed an affidavit which was submitted to the Government as part of the foregoing net worth statement, averring the foregoing. This affidavit was never produced by the Government but was brought forth at the trial by appellant as Defendant's Exhibit "G".

Olender testified to the same effect as Monroe Friedman except that he stated there was \$75,000 in \$100 bills in the safe deposit box in April and May, 1944. (R. 570-1.)

Olender also testified that prior to the visit to the safe deposit box in April, 1944 he had withdrawn \$5000 or \$10,000 therefrom for the purpose of a business trip to Texas; that he didn't use this money and on his return and when Monroe Friedman's name was taken off the safe deposit box, that he thereafter put this money back in the safe deposit box. The testimony of Olender and Monroe Friedman establishes that on May 5, 1944 Olender had at least \$70,000 in his safe deposit box and, taking the lower figure of the money brought back from Texas,

that there was added to this at least the sum of \$5000, making \$75,000 in cash at the end of May, 1944.

Here it is important to note that there were no undisclosed sources of income to which could be credited any cash expenditures. Olender testified that his only sources of income were from the Army and Navy Store; his properties in Fresno; dividends and interest on stocks and bonds and gifts and that all expenditures made by him were either out of the store bank accounts, his personal bank accounts or out of cash in his safe deposit box. (R. 550, 551.)

Revenue Agent Whiteside testified that the Government had records of large cash transactions running as high as \$5,000, \$10,000 and \$15,000 and that a check showed that this cash did not come out of appellant's bank accounts. (R. 467.)

Whiteside further testified that they found records of bonds having been purchased with cashier's checks and that the cashier's checks had been purchased with cash. (R. 466-7.)

Whiteside further testified that the Government had not made any computation or investigation to determine how much cash expenditures had been made by Olender as distinguished from expenditures by check on his various bank accounts. (R. 467-8.)

The record shows, among other cash expenditures, that in 1945 Olender opened three trustee accounts for his children in the sum of \$15,000 cash. (Testimony of Olender, R. 626; Defendant's Ex. "AA"; U.S. Ex. 10 and Defendant's Ex. "D", R. 561); that \$5,000 cash was expended for United States Treasury Bonds (Defendant's

Ex. "D", R. 561; U.S. Ex. 10); that \$10,000 in cash was deposited to Olender's personal bank account (Defendant's Exs. "W" and "D").

The stipulation (U.S. Ex. 11) shows that at the end of 1944 appellant and his wife had \$24,000 worth of United States Treasury Bonds; that at the end of 1945 this sum had been increased to \$82,000, an increase of \$58,000; deducting from this the \$20,000 of bonds belonging to defendant's mother it leaves an increase of \$38,000 for the purchase of bonds. Thus, we find large cash expenditures in 1945 far in excess of the \$50,000 the Government sought to rely upon that could only have come out of the cash in Olender's safe deposit box.

Furthermore, U.S. Ex. 36, R. 583, the transcript of the bank account of the Army and Navy Store, shows that on June 30, 1945, \$8000 was deposited to this account.

Thus Olender had a substantial amount of cash at the end of 1944. This was either the amount as testified to by Olender or an undetermined amount which would render the computations of the Government erroneous and the proof insufficient.

The trial Court instructed the jury that they could not use the sum of \$50,000 relied on by the Government for any purpose but that they could use "whatever amounts the defendant said he had while he was on the witness stand here under oath". (R. 927.)

If Olender's testimony is believed, as it should be, then the sum of \$75,000 must be credited to him in computing his opening net worth.

On all fours with the present case is the case decided in the Fifth Circuit based upon the rulings in the *Holland*

case and the companion cases decided by the Supreme Court.

In *Vloutis v. United States* (5 Cir.) 219 F. 2d 782, the Government relied on the net worth method of proof to establish income tax evasion for the years 1944 and 1945. Involved was the question of how much cash the defendant had on hand at the opening net worth period.

In discussing the value of Government computations, the Court at p. 791 stated:

“Of course, the calculations made in these cases are only as sound as the investigation is complete, because the method *assumes* that the annual increases in net worth are attributable to taxable income received during the year. If the taxpayer had had non-taxable income (from loans, gifts, bequests or tax-free interest, for example) with which he could have acquired the assets, the premise upon which the calculations are based falls; and the calculations are meaningless. Likewise, since the prosecution is limited to the specific period charged in the indictment, the foundation of the structure collapses if the taxpayer had on hand at the beginning of the period sufficient undisclosed funds to acquire the assets listed, whatever the source of those funds. Because the prosecution is *based* upon assumptions and is proved almost entirely by circumstantial evidence, the courts must closely study the evidence to see that the Government has been fair in its presentation of the evidence and to be certain that the jury would be justified in concluding the underlying assumption sound.” (Court’s italics.)

The defendant had testified that he had \$40,000 at the end of 1941. The Government agent testified that he had no such money.

The Court at p. 782 states the testimony of the Government agent as follows:

“Under vigorous cross-examination, he admitted he did not know how much cash appellant had at the beginning of the prosecution period, but stated he had not shown any cash because he had no evidence to reveal any and didn’t believe appellant had any. He went further to say that appellant had told the investigators of \$40,000 cash as of December 31, 1941, and even if there had been such a fund, it would have been spent for the assets acquired up to December 31, 1943 (the beginning date).”

Such was the stand of the Government herein. Internal Revenue Agent Whiteside testified: I knew at the last trial that Olender was contending that he had over \$70,000 in cash in his safe deposit box as of December 31, 1944. (R. 463.) I heard the affidavit of former Judge Monroe Friedman read at the first trial of this case wherein he stated that as late as May, 1944 he knew there was over \$70,000 in that box. (R. 463.) It wasn’t necessary to do anything to verify or disprove that statement *as May of 1944 was not a date that was material. We wanted to know how much cash he had on hand as of December 31, 1944.*⁸

At p. 793 the Court states part of the evidence relating to Vloutis’ cash expenditures thus:

“Here, however, there is serious doubt that the point can be so easily resolved. It should be noted that

⁸The first trial was held in September, 1952. The present trial started on August 1, 1955. On September 13, 1948 appellant filed with the Revenue Department his comparative net worth statement (U.S. Ex. 10) to which was attached the affidavit of Monroe Friedman to the effect that in May, 1944 Olender had over \$70,000 in cash in his safe deposit box.

the investigators never did ask appellant how much cash he had on December 31, 1943. The Government's own evidence showed the following purchases or transactions by appellant: November 15, 1943, bonds in the amount of \$5,571.25; December 14, 1943, bonds in the amount of \$5,000.00; January 1, 1944 (the very first day of the prosecution period), bonds in the amount of \$5,610.92; January 10, 1944, loan to a friend of \$3,000.00; during the month of January, 1944, United States bonds in the amount of \$3,825.00; February 15, 1944, stock in the amount of \$1,800.00; April 13, 1944, bonds in the amount of \$6,152.30. The records of the investment company (which the Government examined) and the testimony of one of its brokers (whom the Government interviewed) showed that of the amounts listed, totaling \$30,959.48, *at least \$23,291.48 was paid in cash*. The investment broker further testified that in December, 1943, and again early in 1944, he went with appellant to the latter's bank box; that he saw therein several large brown envelopes; that appellant opened two envelopes on each occasion and extracted cash with which to buy stocks or bonds." (Court's italics.)

The Court arrives at the following conclusion on page 793:

"Certainly, then, there was evidence to indicate to the Government that appellant had some undisclosed cash on hand as of December 31, 1943. How much he had was, of course, a fact to which only he could testify; but in the face of such evidence as the Government uncovered in the investigation, we think portions of Roussell's testimony were impermissible conclusions which invaded the province of the jury."

In the instant case we find, as was set forth in the *Vloutis* case, large cash expenditures, an independent and credible witness testifying that he went to the safe deposit box in May of 1944 wherein there was over \$70,000 in cash.

In the *Vloutis* case the Government agent testified that the defendant had advised them that in 1941 he had \$40,000 in cash and further testified in effect that they were not concerned with that date but what he had on December 31, 1943. Here, Agent Whiteside testified that the Government was not concerned with what Olender had in May of 1944; that the only concern was how much he had at the end of December, 1944.

In *United States v. Costello* (2 Cir.) 221 F. 2d 668 (also decided after the *Holland* case), the Government was also relying on the net worth method of proof.

The Court at p. 671 stated as follows:

“The prosecution’s proof started with a supposed ‘net worth’ at the beginning of the year 1946, made up of four items which, less liabilities, aggregate \$250,000, and among which there is no item of cash on hand. *Concededly the ‘net worth’ at the beginning of each year would be falsified to the extent that any such sum was omitted; and with it would fall the computations for later years.*” (Italics added.)

On p. 672 the Court states that “the issue is narrowed to whether Costello had an accumulated cash reserve at the beginning of 1946 out of which the purchases might have come that were shown to have been made, and not declared”.

Costello was charged with evading income taxes for the years 1946, 1947, 1948 and 1949. Thus, the opening net worth would be January 1, 1946. The jury found Costello not guilty for the year 1946. The Appellate Court reversed as to the year 1947 on the ground that the evidence did not establish the charge based upon the assumption that on January 1, 1946 Costello did not have a cash reserve of more than \$30,000 (p. 673).

The Government contended that on January 1, 1946 Costello had no cash reserve whatever. Costello contended to the contrary. A net worth statement dated October 18, 1937 was made by Costello to the Tax Bureau in which he stated that on that day he had a cash reserve of between \$25,000 and \$30,000.

On pp. 672-3 the Court points out the various computations covering the indictment years and reversed the conviction on the second count of the indictment (1947), stating as follows:

“In deference to the limitations imposed upon any use of the ‘net worth’ method, we feel obliged to say that the evidence did not justify a verdict based upon the assumption that on January 1, 1946, there had not been a reserve of more than \$30,000; or indeed of more than \$40,000.”

At the beginning of the opinion in the *Costello* case the Court summed up the elements of the net worth method of proof as follows:

“This method presupposes that the prosecution first proves what property the taxpayer had at the beginning of the year in question and what he had at the end of it. To the remainder obtained by subtracting the first from the second it adds whatever

sums it can prove that he spent in the year in question. That is the putative gross income for the year; and the remainder, after deducting the amount of gross income reported, is by hypothesis the unreported gross income. However, this is not enough, for it does not follow that all that the taxpayer expended was necessarily taxable income, or indeed income of any kind. Conceding something for the difficulty of establishing by impregnable proof how much was income, the Court is satisfied with 'proof of a likely source, from which the jury could reasonably find that the net worth increases sprang.' "

See, also, the earlier cases of *United States v. Fenwick* (5 Cir.) 177 F. 2d 488, 491; *Bryan v. United States* (5 Cir.) 175 F. 2d 223, 225; *Brodella v. United States* (5 Cir.) 184 F. 2d 823.

So here, either the evidence established a cash reserve on December 31, 1944 of \$75,000 or the evidence established an undetermined substantial amount of cash on that date. In the latter event the proof of the Government did not meet the test laid down in the *Holland* case and did not establish to a reasonable certainty the opening net worth of appellant.

Appellant was entitled to be credited with an additional \$20,550 in his opening net worth.

The Government conclusively proved that in the early months of 1944, appellant had expended \$20,550, represented by cashier's checks purchased with cash payable to George Goodman for 822 sailor suits.⁹

⁹Note that this expenditure was made before the counting of the net worth in May, 1944 by Olender and Monroe Friedman.

The Government failed and refused to credit Olender with the value of these sailor suits at the end of 1944 or, if said suits had been sold, with the proceeds of such sale. However, Olender testified that all of these suits were on hand but not included in his inventories at the end of 1944.

The evidence relating to these suits was given by appellant, Louis Levy and Morris Lerman.

Olender testified that cashier's checks (U.S. Exhibit 6) totalling \$20,550 were made out at the request of Louis Levy payable to George Goodman (R. 588); that on a trip to New York Levy thought he could purchase some sailor suits; that when in New York, Levy communicated with him to send on these checks (R. 587); that as a result he received 822 sailor suits from the Seagoing Uniform Company and that when he opened the suits he found they were mismarked as the suits were all larger in size than the markings thereon (R. 589); that as his dealings were with Levy, he complained to Levy about the mismarkings of the suits (R. 590); that the suits were all large sizes and only small size sailor suits were in demand; that he had no way of cutting down these large size sailor suits (R. 588); that he put the suits in his basement where they remained over a year and Levy said he would try to sell some of them for him (R. 591); that as he had paid cash for these suits out of his safe deposit box, he didn't put any entry in the books of the Army and Navy Store of this expenditure of \$20,550 and he didn't include the suits in his inventory at the end of 1944 because the transaction was indefinite and uncertain (R. 594); that in 1945 Levy sold 200 of these suits for him at

ost, to-wit, \$5000 (R. 592) and that he deposited this amount in the store's bank account and entered it in the books as a capital investment (R. 594); that later in 1945 Levy sold 280 more of these suits for \$7000 (R. 595); that he hadn't included the 822 suits in 1944 inventory as he didn't know what was going to happen to them and because he hadn't made any entry of their purchase. (R. 597.)

MORRIS LERMAN testified that in 1945 he purchased 200 suits from Louis Levy for \$5000 (R. 525); that he received the sailor suits and they were mismarked; that they were larger than marked; that in 1945 he had tailors in his establishment who could make alterations (R. 528); that when he found the sailor suits were mismarked he notified Mr. Levy thereof. (R. 537, 545.)

That he paid Levy with 2 cashier's checks of \$2500 each. (R. 526-9; Defendant's Exs. "K" and "L".) Each of these checks is payable to L. Levy, is endorsed by Levy and then by Army & Navy Store, per M. Olender. (R. 29-30.)

LOUIS LEVY testified that he negotiated the purchase of these sailor suits from George Goodman for Olender (R. 850); that after he returned from New York, Olender complained that the suits were not properly marked and that he was having trouble; that he wrote to Goodman regarding the sizes and never got a reply (R. 851); that subsequently he sold 200 of these suits to Lerman at \$25 each and subsequently sold \$7000 worth for Olender. (R. 852.)

Olender testified that he sold none of the Goodman suits during 1944 (R. 758); that in 1945 he included 322

of these suits, this being the difference between the 822 purchased and the suits sold by Levy, in his inventory at the end of that year. (R. 597.)

As these suits were purchased in 1944; were still in appellant's possession at the end of that year, they properly should have been included as part of his net worth at the end of 1944, thereby increasing his net worth by an additional \$20,550.

(c) The amount of cash on hand at the end of 1945 was substantial but undetermined.

The Government in its computations credited Olender with \$7200 as cash in safe deposit box on December 31, 1945. The Court ruled and so instructed the jury that this figure could not be relied upon or considered by either the Government or the jury (R. 927, 943) but that the jury could consider any evidence given by the appellant as to this amount.

Olender testified that he didn't remember how much cash was in the box at the end of 1945. (R. 715.) Thus, *just as occurred at the beginning of 1945, the amount of cash, though substantial, remained undetermined and as such throws out all computations as to Olender's net worth at the end of 1945.*

That there was a substantial amount of cash is evidenced by the record which shows that in 1946 large cash deposits were made in Olender's personal bank account as follows: May 1st—\$6000, September 23rd—\$1500, November 25th—\$6000, December 4th—\$2800, December 20th—\$1500. (Defendant's Ex. "W".) The record also shows that in 1946 \$5000 cash was deposited by Olender to the

Olender-McGreet bank account (Defendant's Ex. "AB"; R. 628); that on May 2nd—\$1700 and on September 1st—\$2500 cash was deposited in the Olender-Elkus bank account. (Defendant's Ex. "V"; R. 621.)

Olender testified that all cash transactions not evidenced by checks on either his personal or store accounts came out of the cash in his safe deposit box. Thus, large cash transactions in 1946 amounted to \$27,000 with no evidence in the record of any cash receipts not deposited in the bank accounts except the sum of \$1725.11 received from the Fresno property. (R. 612.) These figures must be given weight and consideration as was done in the case of *Vloutis v. United States* quoted from and discussed above.

) The Government erroneously included the sum of \$7724 as an asset at the end of the year 1945.

This sum of \$7724 was the proceeds of a cashier's check (U.S. Exhibit 34) issued November 19, 1945 to the Army and Navy Store and was paid by the bank on March 27, 1946. (R. 340.)

The history of this check is contained in the testimony of Olender, Louis Levy and the books of account of Moe Maraga which were admitted in evidence as Defendant's exhibits "X", "Y" and "Z", admitted in evidence by stipulation at R. 625.

Olender testified that when Louis Levy sold 280 of the Goodman suits for him in 1945 for \$7000, that Levy retained this money and took it to New York for the purpose of attempting to buy additional sailor suits for him (R. 595-6); that Levy delivered this \$7000 to Moe

Saraga, a dealer in New York (R. 598); that around August or September of 1945 Olender had a transaction with Moe Saraga for sailor suits in which he sent to Moe Saraga checks on his store account totalling \$18,000 and an additional \$6500, making a total of \$24,500 which, plus the \$7000 that Levy had given Saraga made a total of \$31,500 (R. 600); that Defendant's Exhibit "R" was an invoice from Saraga to the Army and Navy Store dated July 31, 1945 for 1000 suits at \$25, total \$25,000 (R. 601); that Saraga couldn't furnish all of the 1000 sailor suits, there being 49 undelivered; that he received a check from Saraga for \$7725 representing the \$7000 Levy had delivered to Saraga plus the balance of the refunds due on the undelivered suits; that he put the check in his bank for collection and it was returned for not sufficient funds; that he redeposited it and got a satisfactory check; that the bank charged him \$1.00 for collection, leaving the \$7724. (R. 603-607.)

Olender also offered in evidence his Exhibit A-I, check payable to the Army and Navy Store for \$7725 dated November 15, 1945 and signed by Saraga bearing a notation thereon "Refund paid in full 49 suits at \$25.00, \$1,225.00; 8/6/45 deposit \$6,500, \$7,725.00 total."

Defendant's Exhibit AH is a certified check made out to Lou Levy for \$7724 dated 6/24/1946, signed by M. Saraga on a New York bank and has writing in the upper lefthand corner reading "Repayment in full advance made". (R. 823-824.)

The last check bearing the endorsements in the following order: Louis Levy and Milton H. Olender.

The account books of Moe Saraga substantiate the foregoing.

Defendant's Exhibit "X", pp. 80 and 86 show the receipt of \$24,500 from the Army and Navy Store. Page 4 of the same Exhibit shows a refund due of \$7000. Page 27 shows a check dated November 15, 1945 of \$7725 and defendant's Exhibit "Z", page 50, shows additional receipt of \$7724 and Exhibit "Y", page 33 shows under date of June 24, 1946 a certified check sent by Saraga to Olender for \$7724.

LOUIS LEVY testified that on the sale of the sailor suits he took the \$7000 to New York and turned it over to Saraga (R. 853); that later Saraga returned the \$7000 because he couldn't deliver any of the suits by check payable to the Army and Navy Store and this check bounced; that some time after he sent a check made out to Louis Levy which he turned over to Olender. (R. 855.)

It follows from the foregoing that \$7000 of this \$7724 represented part of the 822 sailor suits purchased by Olender from Goodman, as above set forth, in the early part of 1944. Either this sum of \$7000 should not be included as an asset at the end of 1945 or Olender's opening net worth on December 31, 1944 should at least be credited with this sum of \$7000. In either event it would not increase Olender's net worth at the end of 1945. The additional \$724 cannot be construed as additional income in 1945 because it is offset by the sending to Saraga of the \$24,500 for which sum of \$724 Olender received nothing.

- (e) **The Government erroneously included \$20,000 worth of Government Bonds as being the property of appellant on December 31, 1945.**

The evidence as to the ownership of these Bonds is conclusive. Olender testified that at the end of 1944 or early in 1945 his mother brought up \$20,000 of her money which was put in the safe deposit box (R. 554); that on December 5, 1945 he purchased with cash \$25,000 worth of Government Bonds (Defendant's Exhibit D-1); that \$20,000 was his mother's and \$5000 was his (R. 555); that he placed \$20,000 worth of the Bonds in an envelope on which he wrote: "The property of Mrs. J. Olender" and the numbers of each bond; that on May 5, 1948 accountant Ringo went to the safe deposit box and that envelope was in the box with the Bonds in it (R. 556); that on August 16, 1946 he received a letter from the Treasury Department asking for an explanation of certain currency transactions and he received a second letter asking for the transaction of \$25,000 on December 5, 1945. These letters are set out in the record at pp. 559 and 560; that on August 23, 1946 Olender wrote to the Internal Revenue Agent wherein he stated that of the \$25,000 transaction on December 5, 1945, \$20,000 represented the purchase of Bonds for his mother on her written instructions. (The letter is set forth in full in the record at pp. 560 to 562); that on November 23, 1945 defendant received a letter from his mother (Defendant's Exhibit "N"), reading in part that if he had no further need of the cash in the box she preferred that he put it in Government Bonds (R. 563); that on December 14, 1945 he received a letter from his mother (Defendant's Exhibit "O") stating that as to the Bonds he bought for her last week,

e should keep them up there (in Oakland) for me (R. 65); that he kept the \$20,000 worth of Bonds for his mother until they were sold in 1953 by the Bank of America for which a check was issued payable to the Estate of Molly Olender and was deposited in the Estate of Molly Olender, she having died in the meantime. (R. 65-6.)

CHARLES RINGO, the accountant, testified that on May 5, 1948 he made an inventory of Olender's safe deposit box (R. 221, U.S. Exhibit 20); that on this inventory he listed as "Bonds being held for mother" four \$5000 U.S. Treasury Bonds giving the numbers thereof; that he took those numbers off the Bonds (R. 228); that he made the notation that the Bonds were being held for Olender's mother on something that he saw at the safe deposit box; that they had some markings showing they were the mother's Bonds. (R. 202, 203, 229, 230.)

MR. CARROLL of the Bank of America testified that in July of 1943 the bank received an order to sell the same Bonds that were listed in Ringo's inventory by number signed "Estate of Molly Olender by Milton Olender" (Defendant's Exhibit "H", R. 518); that pursuant to said order the Bonds were sold and a cashier's check (Defendant's Exhibit "I") was issued payable to the order of the Estate of Molly Olender for \$18,959.40. (R. 520.)

Defendant's Exhibit "P" is a supplementary inventory filed in the Estate of Molly Olender on March 30, 1953 by Milton Olender and on page 3 thereof lists as assets of the estate \$20,000 worth of U.S. Bonds bearing the same numbers as those listed on the inventory made by Ringo.

Starting with the letters written by Olender's mother in November and December of 1945, followed by the information given to the Internal Revenue Department in August of 1946, the inventory taken by Ringo in May of 1948, the sale of the Bonds, the issuance of the check to the Estate of Olender's mother, the depositing of that amount in her estate and the listing of the Bonds as an asset of that estate, we find an unbroken line of evidence establishing that the \$82,000 worth of Bonds relied on by the Government as property of Olender at the end of 1945 should be reduced by the sum of \$20,000.

(f) Computations and summary of the foregoing points.

A consideration of the foregoing points demonstrates that no competent proof was offered establishing to a reasonable certainty Olender's opening and closing net worth for the year 1945 and so the evidence was insufficient to establish the charges in counts 1 and 2 of the indictment.

Disregarding Olender's testimony as to the amount of cash on hand at the end of 1944, the remaining evidence in the case, oral and documentary, establishes a large amount of money far in excess of the sum of \$50,000 the Government sought to rely upon. If we add Olender's testimony that there was \$75,000 in cash on this date, then we find that Olender's net worth at the end of 1945 was at least \$25,000 less than that contended for by the Government.

In *Holland v. United States*, 348 U.S. 121, the Supreme Court states as follows:

“We agree with petitioner that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer’s assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.”

On p. 138 the Supreme Court announces that:

“Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.”

Here, there is no proof of any such likely source from which one could reasonably find that any increases sprang in Olender’s net worth. Olender testified to the only sources of income he had and from which any expenditures were made by him. There was no evidence in the record to the contrary.

Again in the *Holland* case, the Supreme Court rules as follows:

“When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer’s innocence. When the

Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

Revenue Agent Whiteside testified that no attempt was made to ascertain the amount of cash on hand at any of the indictment periods; that they preferred to take Olender's extrajudicial statement in that regard and ignored the affidavit of Monroe Friedman attached to the net worth statement filed in September of 1948 (U.S. Ex. 10); that though they had the books, records and checks of Olender and knew of large cash expenditures, no effort was made to determine the amount of cash expenditures as distinguished from withdrawals from Olender's bank account (R. 464-469); that he knew of Monroe Friedman's affidavit at the first trial (1952) and heard Olender contend at that trial that he had over \$70,000 in his safe deposit box. (R. 463-4.)

The Government made no attempt whatever to investigate any lead as to the amount of cash Olender had on hand at any time involved. Under these circumstances the judge should have considered Olender's testimony supported by Monroe Friedman's affidavit and testimony and the evidence of cash expenditures and transactions as true and granted the motion for judgments of acquittal.

In *Smith v. United States*, 348 U.S. 147, 155, it is stated:

"Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increased, the Government could not succeed."

The tax returns filed on behalf of appellant and his wife for the year 1945 (U.S. Exs. 1 and 2) showed a joint net taxable income of \$41,067.61. The Government contended (U.S. Ex. 50) that there was unreported net taxable income for 1945 in the sum of \$46,931.63. This figure of the Government was based on the use of \$50,000 cash on the opening date and \$7200 cash on the closing date. (Figures which the Court ruled could not be used.)

As demonstrated above, \$20,000 (the mother's bonds) was erroneously included in the closing net worth. Also the sum of \$7724 was likewise erroneously included. If Olender's testimony is accepted that he had \$75,000 in cash on the opening net worth date, then we find that the Government's opening net worth figure must be increased by \$25,000 and the closing net worth decreased by \$27,724 leaving no unreported income for the year in question.

If we disregard the figure of \$75,000 and add to the opening net worth the value of the Goodman suits of \$20,550, the same result is arrived at. Of course, if the opening net worth is credited with both \$25,000 and \$20,550, then the computations show an over-statement of taxable income.

If the jury disregard the testimony of both Olender and Friedman, then there is no evidence establishing to a reasonable certainty the net worth of Olender on December 31, 1944 and December 31, 1945, resulting in a total failure of proof.

So, no matter which way the figures are arranged, the result is the same; either evidence of the opening and

closing net worths were so indefinite as not to constitute reasonable certainty or the adjusted opening and closing net worths result in no unreported taxable income.

In addition to the foregoing, Olender testified that in 1944 and 1945 he received gifts from his mother totalling \$8500 in cash and that this money went into his safe deposit box. (R. 573, 582, 642.) He also testified that his mother-in-law had delivered to him during these years \$2500 to be held in trust for Olender's stepson (R. 694); that this money went into his general account and subsequently was transferred to his wife's bank account and by her paid out to his stepson. There was also evidence of the receipt of several thousand dollars from his Fresno properties which in turn went into his safe deposit box. (R. 614.)

We have not discussed whether these contentions of Olender were correct, although they are supported by other portions of the record, for the reason that whether he did or did not receive these amounts would not change the foregoing conclusion that neither the opening nor closing net worth of appellant was established to a reasonable or any degree of certainty.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSES SET FORTH IN COUNTS 3 AND 4 OF THE INDICTMENT. (Specification of Errors Nos. I, IV and V.)

The foregoing argument demonstrates that the Government failed to prove to a reasonable certainty or to any degree of certainty at all the net worth of defendant on December 31, 1944 and on December 31, 1945, the last date being the closing net worth for the year 1945 and the opening net worth for the year 1946. A failure to prove the net worth on either of these dates renders all computations for the year 1946 indefinite, uncertain and insufficient to establish the charges set forth in counts 3 and 4 of the indictment.

In *United States v. Costello*, (2 Cir.) 221 F. 2d 668, 669, Costello was charged with evading income taxes for the years 1946, 1947, 1948 and 1949. The jury acquitted as to the year 1946 and the Court of Appeals reversed as to the year 1947 because the opening net worth at the beginning of 1946 had not been established to the degree set forth by the Supreme Court in the *Holland* case and, in doing so, said:

“Concededly the ‘net worth’ at the beginning of each year would be falsified to the extent that any such sum was omitted; and *with it would fall the computations for later years.*” (Italics added.)

As additional reasons why the opening net worth for the year 1946 (December 31, 1945) was never sufficiently established, we find the following cash transactions in 1946, (bearing in mind that the Government unsuccessfully sought to rely on the figure of \$7200 being the amount of cash on hand as of this date): Defendant’s

Ex. "W", shows the following amounts in cash were deposited to Olender's personal account on the following dates in 1946: May 1st—\$6000; September 23rd—\$1500; November 25th—\$6000; December 4th—\$2800; December 20th—\$1500. The record further establishes that on May 29, 1946 defendant purchased a cashier's check with cash in the sum of \$3000 (R. 309-11), and a cash deposit of \$2500 on September 19, 1946. (R. 311, U.S. Ex. 29.)

The record further disclosed that in 1946 \$5000 in cash was deposited by Olender to the Olender-McGrete bank account (Defendant's Ex. "AB"; R. 628); that on May 2d \$1700 and on September 18th \$2500 cash was deposited by Olender in the Olender-Elkus bank account. (Defendant's Ex. "V"; R. 621.)

These cash deposits in 1946 must be considered as indicating a large amount of cash on hand as of December 31, 1945. (Cf. *Vloutis v. United States, supra.*)

Although the failure to prove the original opening net worth on December 31, 1944 destroyed any proof of net worth as of December 31, 1945 (Cf. *United States v. Costello, supra*), the cash expenditures made in 1946 render all proof by the Government wholly insufficient as to the net worth of appellant on December 31, 1945, even if we disregard the insufficiency of the proof as to his net worth on December 31, 1944.

II. THE COURT ERRED IN ADMITTING AS EVIDENCE FOR THE GOVERNMENT THE TESTIMONY OF JOHN SANCHIRICO AND THE EXHIBITS INTRODUCED THEREUNDER. (Specification of Error No. VI.)

Sanchirico testified that he was associated with the Seagoing Uniform Corporation in Brooklyn, New York since 1929. (R. 889.) He was asked if he entered into a transaction with George Goodman in connection with the manufacture of sailor suits and then was asked as to what Goodman was to do as part of his duties in connection with that transaction. An objection was made and overruled that the question called for the opinion and conclusion of the witness and called for hearsay testimony. (R. 891.) The witness then went on to describe the arrangement made with Goodman (R. 893) and then stated that he was familiar with the books and records of the Seagoing Uniform Corporation; that the original invoices and shipping tickets for 1944 and 1945 had been destroyed. (R. 893.)

The witness was then asked what arrangements were made in the shipment of goods which were the property of Mr. Goodman and which had been manufactured by the Seagoing Uniform Corporation. Appellant objected that this called for hearsay testimony and the Court overruled the objection. (R. 894.)

The witness then stated that when uniforms were manufactured for Goodman's account they were shipped in accordance with Goodman's instructions to individual customers; that at the time of shipment the clerk would write a shipping memorandum which would indicate how many garments were involved and where they were shipped to together with the name of the customer and the street and

number and that after the shipping memorandum was prepared the shipment was made usually the same day. (R. 895.)

The witness then identified a series of documents consisting of shipping memoranda and invoices. Appellant objected to the introduction in evidence of these documents on the ground that all this was not proper rebuttal. The Court overruled the objection and the documents were admitted in evidence as U.S. Exs. 66 to 71 inclusive. (R. 900-903.)

The witness then explained the Exhibits as follows:

Ex. 66—Shipment of 103 suits to Olender and 300 suits to the Army and Navy Store, Oakland on February 8, 1944.

Ex. 67—60 suits shipped February 19, 1944 to an Army and Navy Store or Olender.

Ex. 68—70 suits shipped May 25, 1944 to Olender.

Ex. 69—30 suits shipped June 8, 1944 to Olender or an Army and Navy Store.

Ex. 70—370 suits shipped June 8, 1944.

Ex. 71—71 suits shipped June 14, 1944.

The witness then testified that he was in the service during 1944 (R. 903) and had little contact with the management of the Seagoing Uniform Corporation while he was in the Coast Guard. (R. 904.)

On cross-examination he testified he was not there when the shipping receipts and invoices were made; that the invoices were not sent to the person to whom the suits were shipped but were sent to George Goodman (R. 906);

that the invoices showed the price of the goods to Goodman (R. 910); that the name "Army and Navy Store" was a trade name used by many people in many cities (R. 910); that he didn't know whether the goods on Exhibits 66 to 71 were actually shipped; that he was merely testifying as to the custom (R. 911); that he was in the service 25 months from August, 1943 to September, 1945.

The objections of appellant should have been sustained.

It must be apparent that the testimony given by the witness was hearsay of the rankest kind. He testified that he was not present when the various Exhibits were made; that he didn't know whether the goods had been shipped; that the invoices were not sent to the person to whom he thought the suits had been shipped but were sent to George Goodman.

Testimony as to arrangements that were made between the Seagoing Uniform Company and Goodman was hearsay; appellant was not a party to these transactions and evidence thereof certainly was not binding upon appellant.

An examination of the Exhibits, 66 to 71 inclusive, shows that each of the shipping memoranda contains the following legend: "Ship to George Goodman". Underneath this legend is a list of stores regarding which the witness testified that in his opinion the goods had been sent to the stores so enumerated. The invoices were sent to George Goodman.

An examination of these various Exhibits is of interest.

It must first be remembered that there were all kinds of stores operating under the name of "Army and Navy

Store". Sanchirico so testified. (R. 910.) The witness Louis Levy testified that there were many Army and Navy Stores. (R. 877.) Morris Lerman testified that he was operating an Army and Navy Store on Broadway in Oakland. (R. 524.)

Ex. 66 contains the item that on February 8, 1944, 435 suits were shipped to an Army and Navy Store in Oakland, California.

Ex. 67 shows in typewriting the shipment of suits to an Army and Navy Store, San Francisco. The name "San Francisco" is stricken out and in handwriting there is inserted "1026 Broadway, Oakland, Cal."

Exs. 68 and 69, as do all the others, show the legend "Ship to George Goodman" and underneath are the itemizations of certain suits to Milt Olender.

Ex. 70 which is in typewriting contains nothing as to where the goods are to be shipped other than to George Goodman. However, there is written across the shipping memoranda in a handwriting entirely different from that in which the document was written, the words "Milt Olender" and the invoice is the same.

Ex. 71 says "Milt Olender".

Olender denied that he ever received any of these goods. It is possible that some of these goods may be the reflection of the purchase in 1944 of the 822 suits for \$20,550 which Louis Levy arranged with Goodman for the purchase of for Olender.

There is no evidence that any of these goods were ever shipped to Olender. No records showing payment were

ever introduced by the Government; no express receipts were produced such as were found relative to the \$20,550 transaction.

This testimony of Sanchirico and the Exhibits were undoubtedly introduced by the Government for the purpose of discrediting Olender's testimony that he had no other transaction with Goodman in 1944 except the one for \$20,550 and the one for \$1380. The foregoing testimony was hearsay and the mere opinion and conclusion of the witness and should not have been admitted as evidence in the case.

It is impossible to measure the degree of prejudice to the appellant that the admission of this testimony produced. As said by this Court on the prior appeal, *Olender v. United States*, 210 F. 2d 795:

“This was by no means an open and shut case for the government. The critical issues of fact were close and hotly contested. On the cold record there is little to choose between the government and defense versions of the facts on these issues. Inconsistencies and occasional confusion developed on both sides of the controversy as details of complex financial transactions of appellant multiplied. The jury was left with the difficult decision of which version of the facts to accept. And since the defense case rested primarily upon the testimony of appellant, it was his credibility which was principally at issue.”

The foregoing language applies with full force to the present case before the Court.

CONCLUSION.

There was a total failure of proof to establish the charges set forth in the indictment. The judgment should be reversed.

Dated, San Francisco, California,
March 30, 1956.

LEO R. FRIEDMAN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

U. S. EXHIBIT 50

Net Worth

	12-31-44	12-31-45	12-31-46	Exhibit No.	Witness
store register	\$ 2,500.00	\$ 1,000.00	\$ 1,000.00		Stipulation
ment, Army-					
Store	84,735.50	89,800.50	57,414.65		Stipulation and Ringo
ess bank accts.	3,822.89	31,485.58	36,783.05		Stipulation
check #25104696	.....	7,724.00	.....	34	Carroll
ed drawing check	1,000.00	.....	.....		Stipulation
on stock,					
ing Asturias)	552.95	1,150.00	45,382.40		Stipulation
stock	.....	.....	5,000.00	31	Horne
loan	.....	.....	5,000.00	31	Horne
ls: Series "E"	693.75	768.75	768.75		Stipulation
te, net of depr.	31,600.00	30,875.00	68,511.31		Stipulation
l Furniture	5,000.00	5,000.00	29,701.67		Stipulation
osta Associates,	.....	.....	1,000.00		Stipulation
					Stipulation (amount)
asury Bonds					
51-53	10,000.00	10,000.00	10,000.00		
59-62	.....	8,000.00	8,000.00		
56-59	1,000.00	1,000.00	1,000.00		
52-54	13,000.00	13,000.00	13,000.00		
59-62	.....	25,000.00	25,000.00		
59-62	.....	25,000.00	.....	28	Ringo
ife Insurance	.....	15,833.46	15,833.46		Stipulation
afe Deposit Box	50,000.00	7,200.00	.....	21	Ringo
	<u>\$203,905.09</u>	<u>\$272,837.29</u>	<u>\$323,395.29</u>		
TIES					
able					
Olender	\$ 5,000.00	\$ 5,000.00	\$ 15,500.00		Stipulation
Payable					
. Sloane	.....	.....	24,701.67		Stipulation
	<u>\$ 5,000.00</u>	<u>\$ 5,000.00</u>	<u>\$ 40,201.67</u>		
	<u>\$198,905.09</u>	<u>\$267,837.29</u>	<u>\$283,193.62</u>		

Net Income

	1945	1946	Exhibit No.	Witness
Net worth at December 31	\$267,837.29	\$283,193.62		
Net worth at January 1	198,905.09	267,837.29		
	<u>\$ 68,932.20</u>	<u>\$ 15,356.33</u>		
Increase in Net Worth				
Add—Nondeductible expenditures				
Included in stipulation	19,081.32	23,985.63		
Other expenditures introduced during trial (schedule attached)	125.49	4,335.04		
	<u>\$ 88,139.01</u>	<u>\$ 43,677.00</u>		
Deduct nontaxable portion of net gain from sales of assets	139.77	464.47		Stipulation
Net taxable income				
Husband				
Wife				
1945	\$44,562.19	\$43,437.05		
1946	22,363.76	20,848.77		
		\$ 43,212.53		
Net taxable income per returns				
Husband				
Wife				
1945	\$21,096.38	\$19,971.23		
1946	12,514.81	10,999.81		
		\$ 23,514.62		
Unreported Income				
Husband				
Wife				
1945	\$23,465.81	\$23,465.82		
1946	9,848.95	9,848.96		
		<u>\$ 19,697.91</u>		

Nondeductible Expenditures

	1945	1946	Exhibit No.	Witness
Expenditures not included in Stipulation				
C. Magnin	.....	\$ 863.73	27	Davis
Gray Shop	.....	1,391.01	30	Mendelsohn
Milt Young	.....	925.00	23	Young
Geo. Belling	\$ 125.49	155.30	26	Belling
Furs		1,000.00		Foley

H. Olender
 d, California

Year - 19

	Tax Liability		
	Husband	Wife	Total
ome per returns	\$21,096.38	\$19,971.23	\$41,067.61
orted income (1/2 each spouse)	23,465.81	23,465.82	46,931.63
ome corrected	\$44,562.19	\$43,437.05	\$87,999.24
net long-term capital gain	69.89	69.88	139.77
y net income	\$44,492.30	\$43,367.17	\$87,859.47
al tax exemption, per returns	500.00	500.00	1,000.00
ormal tax net income	\$43,992.30	\$42,867.17	\$86,859.47
y net income	\$44,492.30	\$43,367.17	\$87,859.47
x exemptions, per return	1,000.00	500.00	1,500.00
tax net income	\$43,492.30	\$42,867.17	\$86,359.47
tax @ 3%	\$ 1,319.77	\$ 1,286.02	\$ 2,605.79
(highest rate 69%)	22,149.69	21,718.35	43,868.04
tax	\$23,469.46	\$23,004.37	\$46,473.83
% net long-term capital gain	34.94	34.94	69.88
x liability	\$23,504.40	\$23,039.31	\$46,543.71
liability, per returns	7,931.86	7,563.89	15,495.75
reported tax liability	\$15,572.54	\$15,475.42	\$31,047.96

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 Milton H. Olender
 Oakland, Calif.

Year - 4

	Tax Liability		
	Husband	Wife	Tot
Net income per returns	\$12,514.81	\$10,999.81	\$23,514.62
Unreported income (1/2 each spouse)	9,848.95	9,848.96	19,697.91
Net income corrected	\$22,363.76	\$20,848.77	\$43,212.53
Deduct, net long-term capital gain	232.24	232.23	464.47
Ordinary net income	\$22,131.52	\$20,616.54	\$42,748.06
Exemptions, per returns	1,000.00	1,000.00	2,000.00
Income subject to normal tax and surtax	\$21,131.52	\$19,616.54	\$40,748.06
Normal tax @ 3%	\$ 633.95	\$ 588.50	\$ 1,222.45
Surtax (highest rate 53% on husband, } 50% on wife }	7,259.71	6,468.27	13,727.98
Tentative tax	\$ 7,893.66	\$ 7,056.77	\$14,950.43
20% reduction of tentative tax	394.68	352.84	747.52
Partial tax	\$ 7,498.98	\$ 6,703.93	\$14,202.91
Added, 50% net long-term capital gain	116.12	116.12	232.24
Total tax liability	\$ 7,615.10	\$ 6,820.05	\$14,435.15
Tax liability per returns	3,054.85	2,507.94	5,562.79
Unreported tax liability	\$ 4,560.25	\$ 4,312.11	\$ 8,872.36

SPECIFICATION OF ERROR NO. VI.

amplification thereof by setting forth the substance of the testimony of John Sanchirico and the exhibits introduced during his examination, and the objections of appellant.

JOHN SANCHIRICO, called by the Government in rebuttal, testified in substance as follows:

My home address is in Brooklyn, New York. The Seagoing Uniform Corporation is located in Brooklyn. I have been associated with the Seagoing Uniform Corporation since 1929 and have been active in management since 1940. (R. 889.) The corporation was engaged in the manufacture of naval uniforms in 1944. I do not know Mr. Olender. I knew a Mr. George Goodman. (R. 890.) I met Goodman in 1943.

“Q. (By Mr. Lockley). Can you just answer that question yes or no, did you enter into some transaction with Mr. Goodman in connection with the manufacture of sailor suits?

A. Yes, sir.

Q. And what was Mr. Goodman to do as a part of his duties in connection with that transaction?

Mr. Friedman. Now I will object on the ground first the question calls for the opinion and conclusion of the witness, and secondly, it calls for hearsay testimony.

The Court. I will allow it.” (R. 891.)

We made an arrangement with Goodman whereby he was to supply the materials and we were to make up the uniforms as the result of which, each of us would retain 50% of the uniforms made. We had no control over the 50% of uniforms allocated to Goodman. (R. 893.) I am familiar with the books and records of the Seagoing

Uniform Corporation. The original invoices and shipping tickets for 1944 and 1945 have been destroyed. (R. 893.) During 1944 uniforms were hard to get. In 1944 we did approximately \$738,000 of business with Mr. Goodman.

“Q. What arrangements were made in the shipment of goods which were the property of Mr. Goodman, manufactured by your Company?

Mr. Friedman. Well, again to protect my record, if the Court please, I will object on the ground this calls for hearsay testimony so far as the defendant is concerned.

The Court. I will allow it.” (R. 894.)

After we manufactured the Navy uniforms for Goodman’s account, they were shipped in accordance with Goodman’s instructions, not to Goodman but to individual customers. At the time the shipment was made the shipping clerk would hand write a shipping memorandum which would indicate how many garments were involved and where they were shipped to, the name of the customer and the street number or city. After the shipping memorandum was prepared, the shipment was made usually the same day. (R. 895.) A day or two later the invoices were prepared from the shipping memorandums. (R. 896.)

(Series of photostats marked for identification as U. S. Exhibits 66 to 71 inclusive.)

Exhibit 66 is two documents. The top sheet is a shipping memorandum and the second one is the invoice. Those records were kept by me in the ordinary course of the business of the Seagoing Uniform Corp. They relate

shipments to Milton Olender. On the bottom line it is 133 suits, 18 oz. Army Navy Store, Oakland, California 22". The shipments would be made pursuant to the information contained on Exhibit No. 66.

Ex. No. 67 is an invoice and indicates a shipment to the Army Navy Store at 1026 Broadway, Oakland. The original has been destroyed.

Ex. No. 68 is a shipping memorandum and an invoice relating to shipments to Milton Olender. (R. 898.)

Ex. No. 69 is also a shipping memorandum and invoice indicating a shipment to Milton Olender.

Ex. No. 71 is a shipping memorandum and an invoice relating to shipments to Milton Olender.

All these shipments were made pursuant to instructions received from George Goodman. (R. 898.)

"Mr. Lockley. All right. I offer in evidence Exhibits 65 to 71, inclusive, your Honor.

The Court. Let me ask the witness——

Mr. Friedman. I am going to object——

The Court. Beg your pardon.

Mr. Friedman. Beg your pardon, your Honor.

I object on the ground all this is not proper rebuttal.

The Court. I want to ask the witness: All these records you are identifying, are they records kept by your company in the regular course of this business?

The Witness. Yes, your Honor.

The Court. And was it its business to keep those records?

The Witness. Yes, sir.

The Court. And you say it is not proper rebuttal. I will overrule it, and you may take your exception on it.

The Clerk. U.S. Exhibits 66 to 71, inclusive, heretofore marked for identification, now in evidence.”

(The witness here explains the Exhibits as follows:

Ex. 66—133 suits shipped February 8, 1944 to Olender and 300 suits shipped February 8, 1944 to the Army and Navy Store, Oakland.

Ex. 67—60 suits shipped February 19, 1944 to an Army and Navy Store or Olender.

Ex. 68—70 suits shipped May 25, 1944 to Olender.

Ex. 69—30 suits shipped June 8, 1944 to Olender or an Army and Navy Store.

Ex. 70—370 suits shipped June 8, 1944.

Ex. 71—71 suits shipped June 14, 1944.) (R. 900-903.)

“Q. Do you recall Mr. Goodman ever having complained to you that some of the shipments or the manufacturing by you resulted in suits being mismarked, so that a size 34, marked as such, was actually about a size 38?

A. Well, I was in service during 1944, and I wouldn't know of any such happening.” (R. 903.)

I had very little contact with the management and operation of the Seagoing Uniform Corporation while I was in the Coast Guard. (R. 904.)

Cross-Examination. Ex. 66 is a shipping receipt and invoice made to George Goodman. I was not there when it was made. (R. 905.) This transaction was between George Goodman and Seagoing and no others. Accord-

ing to the shipping memorandum when the goods were sent to any particular place designated, an invoice did not accompany them. The invoice went to George Goodman. (R. 906.) The invoices here show the price of the goods to Goodman. What he sold them for was no concern of ours. (R. 910.) As to whether I knew there was more than one store in one city operating under the name of Army and Navy Store, that happens to be a trade name used by many people in many cities. (R. 910.) As to whether the goods on Exhibits 66 to 71 were actually shipped, I am merely testifying as to the custom. (R. 911.) I was in the service 25 months and was discharged in the month of September, 1945. I entered the service in August, 1943. (R. 911-12.) During this period we would not keep a ledger account as to the consignees named in these shipping receipts. Our ledger account was with George Goodman. (R. 913.)

